Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

AIRBORNE FREIGHT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether taxpayers are entitled to rely on published, firmly established Internal Revenue Service Revenue Rulings.

2. Whether a taxpayer's right to rely on Revenue Rulings includes the right to rely on applicable, long standing, published IRS administrative practice, which has the force of law, and precludes modification of Revenue Rulings through a retroactive litigation position of the IRS.

PARTIES BELOW

The parties below consisted of plaintiff Airborne Freight Corporation and defendant United States of America.

DISCLOSURE PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the petitioner, Airborne Freight Corporation, has no parent or subsidiary company, other than subsidiaries that are directly or indirectly wholly owned by Airborne Freight Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Disclosure Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	4
Reasons for Granting the Petition	8
I. The Ninth Circuit's decision denies the right of taxpayers to rely on IRS Revenue Rulings and in doing so fuels the conflict among the circuits on an issue which this Court has not resolved	9
II. The Ninth Circuit's decision makes a taxpayer's right to rely on revenue rulings meaningless and conflicts with other circuits' deference to published rulings when in conflict with an IRS litigation position	13
Conclusion	16
Appendix	
Appendix A: Order and Opinion of Court of Appeals for the Ninth Circuit	App. 1

TABLE OF CONTENTS – Continued

		Page
Appendix B:	Order and Opinion of Court of Appeals for the Ninth Circuit in *Lucky Stores, Inc. v. Commissioner*.....App.	13
Appendix C:	District court order allowing claimed deductions for pension plan contributions .....App.	22
Appendix D:	Tax Court decision in *Lucky Stores, Inc. v. Commissioner* disallowing disputed deductions for pension plan contributions .....App.	28
Appendix E:	District court order denying United States' motion for reconsideration .....App.	52
Appendix F:	District court entry of judgment .....App.	54
Appendix G:	Order of the Court of Appeals for the Ninth Circuit denying petition for rehearing with suggestion for rehearing en banc .....App.	57
Appendix H:	U.S. CONST. amend. V.....App.	59
Appendix I:	26 U.S.C. § 7805 (1996) .....App.	60
Appendix J:	26 U.S.C. § 7430 (1998) .....App.	62
Appendix K:	26 U.S.C. § 404(a)(6) (1986) ....App.	72
Appendix L:	Treas. Reg. § 601.601 (1986)....App.	73
Appendix M:	Rev. Rul. 76-28, 1976-1 C.B. 564.....App.	81
Appendix N:	Rev. Proc. 89-14, 1989-1 C.B. 814.....App.	85

TABLE OF CONTENTS – Continued

		Page
Appendix O:	Int. Rev. Man. (Audit) 424 (14).3(3) (11-2-81)	App. 94
Appendix P:	Priv. Ltr. Rul. 82-10-014 (1982)	App. 95
Appendix Q:	Priv. Ltr. Rul. 85-43-002 (April 30, 1985)	App. 98
Appendix R:	Priv. Ltr. Rul. 87-14-008 (December 17, 1986)	App. 103

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 2

FEDERAL CASES

Airborne Freight Corporation v. United States, 153 F.3d 967 (9th Cir. 1998) 1, 7

Airborne Freight Corporation v. United States, ¶ 50,004 Standard Federal Tax Reports 1996 ..... 1, 5

Beneficial Foundation, Inc. v. United States, 8 Ct. Cl. 639 (1985) 14

Dillon, Read & Co. v. United States, 875 F.2d 293 (Fed. Cir. 1989) 14

Estate of Gordon B. McLendon v. Commissioner of Internal Revenue Service, 135 F.3d 1017 (5th Cir. 1998) 8, 9, 14

Lucky Stores v. Commissioner, 153 F.3d 964 (9th Cir. 1998) 7

Lucky Stores v. Commissioner, 107 T.C. 1 (1996) 6

McCoy v. United States, 802 F.2d 762 (4th Cir. 1986) 13

Niles v. Commissioner, 710 F.2d 1391 (9th Cir. 1983) .. 14, 15

Rowan Cos., Inc. v. United States, 452 U.S. 247 (1981) 11

Silco v. United States, 779 F.2d 282 (5th Cir. 1986) 14

Sohappy v. Hodel, 911 F.2d 1312 (9th Cir. 1990) 14

United States v. Kaiser, 363 U.S. 299 (1960) 13

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

26 U.S.C. § 404(a)(6) (1986) 2, 5, 6, 9, 13

26 U.S.C. § 7430 (1986) 2, 14

26 U.S.C. § 7805 (1996) 2, 15

28 U.S.C. § 1254(1) (1998) 1

28 U.S.C. § 1346(a)(1) 4

FEDERAL REGULATIONS

Treas. Reg. § 601.201(a)(6) (1996) 3, 9

Treas. Reg. § 601.601(d)(2)(5)(d) and (e) (1986) 3, 9

MISCELLANEOUS

Rev. Rul. 76-28, 1976-1 C.B. 564 ..... *passim*

Rev. Proc. 97-1, 1997-1 I.R.B. 11 9

Rev. Proc. 89-14, 1989 C.B. 814 9

Int. Rev. Man. (Audit) 424(14).3(3) (11-2-81) 11

Priv. Ltr. Rul. 87-14-008 (December 17, 1986) 11, 12

Priv. Ltr. Rul. 85-43-002 (April 30, 1985) 11, 12

Priv. Ltr. Rul. 82-10-014 (1982) 11, 12

Gen. Couns. Mem. 39,667 (October 13, 1987) 11

Cohen, Benjamin J. & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings*, 51 TAXLAW 675 (1998) 15

138 Cong. Rec. S15,356 (1992) 15

PETITION FOR A WRIT OF CERTIORARI

Airborne Freight Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 153 F.3d 967 (9th Cir. 1998). Pet. App. 1. The order of the court of appeals denying Petitioner's timely filed petition for rehearing with a suggestion for rehearing en banc is unreported but is included herein at Pet. App. 57. The order of the district court is reported at ¶ 50,004 Standard Federal Tax Reports 1996. Pet. App. 22. The order of the district court denying the United States' motion for reconsideration is unreported but is included herein at Pet. App. 51.

JURISDICTION

The court of appeals filed its initial opinion on August 20, 1998. Petitioner timely filed a petition for rehearing with suggestion for rehearing en banc on October 2, 1998, which was denied on November 12, 1998. Pet. App. 57. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> no person shall be . . . deprived of life, liberty, or property, without due process of law.

2. 26 U.S.C. § 404(a)(6) (1986), which provides, in pertinent part:

> [A] taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

3. 26 U.S.C. § 7430 (1986) which is attached hereto at Pet. App. 62.

4. 26 U.S.C. § 7805 (1996), which provides, in pertinent part:

> (a) AUTHORIZATION. – Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.
>
> (b) RETROACTIVITY OF REGULATIONS OR RULINGS.
>
> > (1) IN GENERAL. – Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the

> internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:
>
> (A) The date on which such regulation is filed with the Federal Register.
>
> (B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.
>
> (C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

5. Treas. Reg. § 601.201(a)(6) (1996), which provides in pertinent part:

> A "Revenue Ruling" is an official interpretation by the Service which has been published in the Internal Revenue Bulletin, Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

6. Treas. Reg. § 601.601(d)(2)(v)(d) (1986), which provides:

> Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.

7. Treas. Reg. § 601.601(d)(2)(v)(e)(1986), which provides:

> Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions and revenue rulings.

STATEMENT OF THE CASE

Jurisdiction was conferred upon the district court below by 28 U.S.C. § 1346(a)(1).

This case involves the right of taxpayers to rely on published revenue rulings of the Internal Revenue Service ("IRS") and the meaning and extent of that right. In reliance on Revenue Ruling 76-28, 1976-1 C.B. 564, Pet. App. 81, Airborne Freight Corporation ("Airborne") treated contributions made to pension plans under union-negotiated contracts, prior to the due date for filing its tax return, as deductible on that return.

On Airborne's 1989 tax return, which was filed September 15, 1990,[1] Airborne claimed a deduction for all

[1] Internal Revenue Code ("Code") Section 6072(b) requires the filing of federal income tax returns on behalf of corporations maintaining their books and records on a calendar year on or

contributions made to pension plans during the 1989 calendar year and, pursuant to Internal Revenue Code of 1986, as amended ("Code"), Section 404(a)(6), Pet. App. 72, for contributions made to pension plans within the 8 1/2 month grace period immediately following the end of calendar year 1989 (January 1, 1990 through September 15, 1990, the "1989 throwback period"). On Airborne's 1990 Return, Airborne deducted contributions made to pension plans from September 16, 1990 through September 15, 1991 (the "1990 throwback period").

These throwback period deductions satisfy the requirements of Code Section 404(a)(6). The contributions giving rise to the deductions were "on account of" the year in which they were reported on Airborne's tax returns in accordance with the rules set forth in Revenue Ruling-76-28. *Airborne Freight Corporation v. United States*, ¶ 50,004 Standard Federal Tax Reports 1996. Pet. App. 22.

Although Revenue Ruling 76-28 draws no distinction between single employer pension plans and multi-employer pension plans, the IRS allowed Airborne's deductions for the throwback period contributions to its single employer pension plans but denied its deductions for throwback period contributions to multi-employer pension plans.

Airborne paid the taxes assessed and initiated a lawsuit for a refund of monies paid because of the IRS's

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before the 15th day of March. Pursuant to Regulation Section 1.6081-3, a corporation is granted an automatic six-month extension of time for filing its return provided the corporation has timely and properly filed Form 7004 and deposited the full amount of tax due with Form 8109. Airborne complied with the Regulation in filing its 1989 and 1990 tax returns.

denial of the throwback period multi-employer plan deductions. On cross-motions for summary judgement, the district court judge, Judge Barbara Rothstein, ruled that "[Airborne's] actions in claiming deductions for the contributions made during the grace periods are consistent with the language and requirements of [Code Section] 404(a)(6) as well as satisfying the IRS's own guidelines for applying [Code Section] 404(a)(6) set forth in Rev. Rul. 76-28." Pet. App. 25.

The IRS moved for reconsideration of Judge Rothstein's decision after the issuance of the Tax Court's conflicting decision in *Lucky Stores v. Commissioner*, 107 T.C. 1 (1996).[2] Pet. App. 28. Judge Rothstein denied the motion and noted that "the Tax Court decision on which the Government relies is not binding on this Court, nor does it include any persuasive legal analysis for the decision it reaches." Pet. App. 52.

As correctly recognized by Judge Rothstein, Airborne's treatment of the throwback period contributions met the requirements of Revenue Ruling 76-28. Nevertheless, the IRS has attempted to modify that Ruling to limit the deductibility of throwback period contributions to single employer pension plans. Moreover, the IRS has modified this Ruling through litigation rather than in compliance with its own internal administrative rules.

On its face, Revenue Ruling 76-28 does not distinguish between single employer and multi-employer pension plans. The language is clear and needs no interpretation. Further, the IRS has a twenty year history,

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[2] See discussion of *Lucky Stores*, below.

as evidenced by various private letter rulings and technical advice memoranda, of applying the rules of Revenue Ruling 76-28 to single employer and multi-employer pension plans equally.

On appeal, the Ninth Circuit Court of Appeals consolidated this case with *Lucky Stores, Inc. v. Commissioner* for oral argument.[3] Pet. App. 13. By reversing the district court's decision and adopting the IRS's position that Revenue Ruling 76-28 does not apply to multi-employer pension plans, the Ninth Circuit exacerbated the conflict among the circuit and district courts which presents itself each time the reliability of revenue rulings is questioned and effectively eliminated the ability of any taxpayer to rely on any revenue ruling.

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[3] The issues in this case are identical to the issues in *Lucky Stores, Inc. v. Commissioner*, 153 F.3d 964 (9th Cir. 1998). While Petitioner herein was initially successful on its petition for refund in the district court, Lucky Stores was unsuccessful in its petition on the same issues in the Tax Court. The two cases were consolidated for oral argument at the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit decision in the *Lucky Stores* case was binding on Petitioner. The Court stated:

> Our decision on this issue is controlled adversely to Airborne by our decision in *Lucky Stores*, which deals with the identical issue and was filed simultaneously with our decision in this appeal.

Pet. App. 4 (citations omitted). Not only are the issues identical, but also, Lucky Stores' and Airborne's throwback period contributions were to some of the same multi-employer pension plans.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision below effectively eliminates a taxpayer's right to rely on revenue rulings. As recently stated by the Fifth Circuit Court of Appeals:

> Although the Supreme Court has not spoken definitively on the subject, its recent jurisprudence tends to support the view that the courts owe revenue rulings a bit more deference than the Tax Court would have us believe. . . . [L]ittle can be said with any certainty, and in the absence of a definitive statement from on high, the Tax Court continues its crusade to ignore them in toto.

Estate of Gordon B. McLendon v. Commissioner of Internal Revenue Service, 135 F.3d 1017, 1023-4 (5th Cir. 1998).

In holding that Revenue Ruling 76-28 does not apply to contributions made to multi-employer pension plans, the Ninth Circuit provides the IRS the unprecedented leeway to modify a published revenue ruling by way of litigation and without complying with the IRS's own well established and publicly relied on internal rules for modification of revenue rulings. This holding is in direct conflict with other courts of appeal and threatens to further confuse taxpayers and the lower courts until this Court clarifies the important issue of whether a taxpayer is entitled to rely on published IRS rulings, and the meaning of that right to rely.

I. The Ninth Circuit's decision denies the right of taxpayers to rely on IRS Revenue Rulings and in doing so fuels the conflict among the circuits on an issue which this Court has not resolved.

Prior to the Ninth Circuit's decision in this case the existence of a taxpayer's right to rely on published IRS revenue rulings seemed well settled. "Virtually every circuit recognizes some form of deference" although the Tax Court "has long been fighting a losing battle with the various courts of appeals over the proper deference." *McLendon*, 135 F.3d at 1023.

Airborne, in computing its deductions for the throwback period contributions, complied with Code Section 404(a)(6) and relied on Revenue Ruling 76-28 and the IRS's published interpretations of that Ruling.

As detailed in the Treasury Regulations, the IRS publishes revenue rulings to notify taxpayers of its official interpretation with respect to the application of a particular tax law. Treas. Reg. § 601.201(a)(6). Revenue rulings are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. Treas. Reg. 601.601(d)(2)(v)(d). Pet. App. 73. The IRS directs its employees and taxpayers to consider revenue rulings as administrative precedent in determining the tax treatment of transactions. *Id. See, e.g.*, Rev. Proc. 89-14, 1989-1 C.B. 814, Pet. App. 85; Rev. Proc. 97-1, 1997-1 I.R.B. 11.

The IRS published Revenue Ruling 76-28 in 1976 to interpret Code Section 404 and to provide guidance as to the allowance of throwback period deductions for retirement plan contributions "pending the issuance of regulations."

No regulations have been issued. The Ruling permits an employer to elect to deduct currently contributions to certain qualified pension plans which are made within $8\frac{1}{2}$ months after the year has ended (the throwback period) with no distinction between single employer and multi-employer plans.

When the language of a revenue ruling is unambiguous, taxpayers must be entitled to rely on the plain language of the ruling. In this case, since Revenue Ruling 76-28 purports to apply to all qualified pension plans, the Ninth Circuit's failure to allow the claimed deductions amounts to a complete lack of deference to the IRS's own published ruling and offends the core principles of statutory construction.

The Ruling provides that employer payments made to a qualified plan, after the employer's year-end, will be considered to be made "on account of" the preceding taxable year if:

> (1) either (a) the employer designates the payment in writing as payment on account of the preceding taxable year, *or* (b) the employer deducts the payment on its federal income tax return on or before the extended due date of its return for the preceding year; and
>
> (2) the plan treats the payment as it would treat a payment actually received on the last day of the preceding taxable year.

Rev. Rul. 76-28.

As written, the plain language makes no distinction between single employer and multi-employer plans. If,

however, interpretation of this test were necessary, a review of the IRS's prior interpretations of Revenue Ruling 76-28 supports Airborne's treatment of the throwback period deductions. Although private letter rulings generally may not be cited as precedent, this Court has held that private letter rulings are evidence of the position of the IRS. *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 261 n.17 (1981). *See* Int. Rev. Man. (Audit) 424(14).3(3) (11-2-81). Pet. App. 94.

Several taxpayers, some of whom are competitors of Airborne and some of which are related to the same multi-employer plans, requested and received private letter rulings on the basis that the answer was clear from the application of the statute to the particular facts described. *All* of the rulings issued by the IRS consistently held that Revenue Ruling 76-28 applied to multi-employer pension plans. *See*, Priv. Ltr. Rul. 87-14-008, Pet. App. 103; Priv. Ltr. Rul. 85-43-002, Pet. App. 98; Priv. Ltr. Rul. 82-10-014, Pet. App. 95; GCM 39,667.

The IRS has now argued the contrary position and convinced the Ninth Circuit that contributions to a multi-employer defined benefit plan cannot meet the second prong, the "treated in the same manner" test. This is directly contrary to the IRS's own prior, long-standing interpretation of the Ruling, in which it consistently held that the second prong of the test is inapplicable to defined benefit plans. In Private Letter Ruling 82-10-014, the IRS states:

> In defined benefit plans, the requirement that the plan treat the payments in the same manner as payments actually received on the last day of

> the preceding taxable year, is usually meaningless. A contribution does not have any effect on the actual benefits payable to an employee. Thus, for the plan involved in this case, benefits were not affected by the treatment by the plan of the contributions made after the close of the year.

See also Priv. Ltr. Rul. 87-14-008 and Priv. Ltr. Rul. 85-43-002.

As the plain language of Revenue Ruling 76-28 makes clear, and as evidenced by the IRS's consistent administrative policy, there is no distinction between multi-employer and single employer plans; deductions for throwback period contributions should be allowed for both types of plans. The Ninth Circuit's unprecedented finding of such a distinction is a wrongful denial of the deference to be given to, and the taxpayer's right to rely on, published IRS revenue rulings. It is also in direct conflict with other circuits, and is evidence of the confusion existing not only by taxpayers and in the lower courts but also in the Ninth Circuit itself which has a history of deference to long standing administrative policy. The consequence of the Ninth Circuit's ruling is not only that it allows courts to play an administrative role, but also that it provides the IRS the whimsical ability to issue public interpretations of how it will apply its own regulations, only to later challenge them in court.

Further, the plans involved in Private Letter Ruling 82-10-014 were collectively bargained plans, including certain of the multi-employer plans to which Airborne made contributions. The taxpayer's throwback period deductions in the Letter Ruling were allowed, yet, Airborne's deductions *to some of the same plans* have been disallowed. The treatment accorded to other taxpayers'

contributions to the same multi-employer plans must be equally applicable to Airborne. The failure to treat similarly, in this case identically situated taxpayers in the same manner, absent a rational basis for the distinction, violates Airborne's constitutional right to the due process of law. *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring).

II. The Ninth Circuit's decision makes a taxpayer's right to rely on revenue rulings meaningless and conflicts with other circuits' deference to published rulings when in conflict with an IRS litigation position.

This Court has not addressed the issue of the meaning of a taxpayer's right to rely on revenue rulings. By allowing the IRS to litigate a modification of its revenue ruling, which consistent administrative policy has the force of law, the Ninth Circuit created precedent contrary to the holdings adopted in other courts of appeal.

While Code Section 404(a) has been subject to numerous legislative changes since 1976, Code Section 404(a)(6) has not changed since then, and Revenue Ruling 76-28 has neither been modified nor revoked. The Ninth Circuit's decision permits the IRS to revoke Revenue Ruling 76-28 by litigation effectively ignoring the Revenue Ruling. Such a result would not follow in the Fourth or Fifth Circuit. The Fourth Circuit treats longstanding agency interpretations as being deemed approved by Congress and having the force of law. *McCoy v. United States*, 802 F.2d 762 (4th Cir. 1986). The Fifth Circuit would not have permitted the IRS to issue a revenue

ruling on which taxpayers and courts rely and then walk away from that reliance by taking a contrary position in litigation. *McLendon*, 135 F.3d 1017.

The Ninth Circuit's decision below diminishes the "law" of revenue rulings by allowing them to be modified simply through litigation. Illustrative of the inconsistent results of this dilemma is the inconsistency within the Ninth Circuit itself whose decision below is directly contrary to its own prior holding in *Sohappy v. Hodel*, 911 F.2d 1312 (9th Cir. 1990) (longstanding agency interpretations of a statute have the force of law).[4]

The Ninth Circuit's decision is also directly contrary to another of its prior holdings. In *Niles v. Commissioner*, 710 F.2d 1391 (9th Cir. 1983), the court did not permit the IRS to take a position contrary to its long established administrative practice, even when it resulted in a double tax benefit to the taxpayer, and stated:

> [B]y refusing to allow the IRS to deviate from such a long-standing and well-understood administrative practice, we are presumptively supporting the will of Congress. " '[L]ong-continued practice, known to and acquiesced in by

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[4] It is uncommon, and indeed potentially subjects the United States to liability for costs under Internal Revenue Code Section 7430, for the IRS to maintain such inconsistent litigation and rule-making positions. When this has arisen in the past, the courts have uniformly held that the IRS's litigation position will be rejected. *See, e.g., Silco, Inc. v. United States*, 779 F.2d 282 (5th Cir. 1986); *Dillon, Read & Co. v. United States*, 875 F.2d 293, 298-99 (Fed. Cir. 1989). *See also Beneficial Foundation, Inc. v. United States*, 8 Ct. Cl. 639, 645 (1985) (revenue ruling held to be binding upon the IRS).

> Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent. . . . ' " Moreover, the Supreme Court has specifically emphasized the probative value of long-standing administrative practice in the interpretation of the Internal Revenue Code.

Niles, 710 F.2d at 1395 (citations omitted).

As a part of the Taxpayer Bill of Rights, Code Section 7805, Pet. App. 60, was amended to disallow retroactive application of proposed and final regulations. Incredibly, in arguing against this limitation, the Treasury Department asserted that retroactive regulations may benefit taxpayers by preventing Internal Revenue agents from taking aggressive anti-taxpayer positions. Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAXLAW 675, 686 (1998) (citing *Taxpayer Bill of Rights 2: Hearing Before the Subcomm. On Private Retirement Plans and Oversight of the IRS*, Senate Fin. Comm., 102d Cong. (1992)). As stated by Senator Pryor, however, "It is time we level the playing field, and it is time we took this stifling, awesome power and removed it once and for all from the Internal Revenue Service." 138 Cong. Rec. S15,356 (1992).

The same now holds true with the IRS's published revenue rulings. In conflict with other United States Courts of Appeal, the Ninth Circuit has allowed the IRS to retroactively modify its revenue ruling, through litigation and outside its stated administrative practice.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflict among the circuits and confirm the taxpayer's right to rely on published Revenue Rulings and define the extent of that right.

Respectfully submitted,

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February 1999

APPENDIX TABLE OF CONTENTS

		Page
Appendix A:	Order and Opinion of Court of Appeals for the Ninth Circuit..App.	1
Appendix B:	Order and Opinion of Court of Appeals for the Ninth Circuit in *Lucky Stores, Inc. v. Commissioner*.....App.	13
Appendix C:	District court order allowing claimed deductions for pension plan contributions .....App.	22
Appendix D:	Tax Court decision in *Lucky Stores, Inc. v. Commissioner* disallowing disputed deductions for pension plan contributions .....App.	28
Appendix E:	District court order denying United States' motion for reconsideration .....App.	52
Appendix F:	District court entry of judgment .....App.	54
Appendix G:	Order of the Court of Appeals for the Ninth Circuit denying petition for rehearing with suggestion for rehearing en banc .....App.	57
Appendix H:	U.S. Const. amend. V.....App.	59
Appendix I:	26 U.S.C. § 7805 (1996) .....App.	60
Appendix J:	26 U.S.C. § 7430 (1998) .....App.	62
Appendix K:	26 U.S.C. § 404(a)(6) (1986) ....App.	72
Appendix L:	Treas. Reg. § 601.601 (1986)....App.	73
Appendix M:	Rev. Rul. 76-28, 1976-1 C.B. 564.....App.	81

APPENDIX TABLE OF CONTENTS – Continued

Page

Appendix N: Rev. Proc. 89-14, 1989-1 C.B. 814 ..... App. 85

Appendix O: Int. Rev. Man. (Audit) 424 (14).3(3) (11-2-81) ..... App. 94

Appendix P: Priv. Ltr. Rul. 82-10-014 (1982) ... App. 95

Appendix Q: Priv. Ltr. Rul. 85-43-002 (April 30, 1985) ..... App. 98

Appendix R: Priv. Ltr. Rul. 87-14-008 (December 17, 1986) ..... App. 103

APPENDIX A

AIRBORNE FREIGHT CORPORATION, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant. AMERICAN TRUCKING ASSOCIATION, amicus; CALIFORNIA CHAMBER OF COMMERCE; CALIFORNIA GROCERS ASSOCIATION; CALIFORNIA RETAILERS ASSOCIATION; FOOD EMPLOYERS COUNCIL, INC.; FOOD MARKETING INSTITUTE; NATIONAL COORDINATING COUNCIL FOR MULTIEMPLOYER PLANS; OREGON GROCERY INDUSTRY ASSOCIATION; WASHINGTON RETAIL ASSOCIATION, Amici Curiae.

No. 97-35129

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

153 F.3d 967; 1998 U.S. App. LEXIS 20298; 98-2 U.S. Tax Cas. (CCH) P50, 664; 82 A.F.T.R.2d (RIA) 5835; 98 Cal. Daily Op. Service 6462; 98 Daily Journal DAR 8990

March 12, 1998, Argued, Submitted, San Francisco, California

August 20, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Washington, D.C. No. CV-95-00301-BJR. Barbara J. Rothstein, District Judge, Presiding.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; REMANDED.

COUNSEL: Steven W. Parks, United States Department of Justice, Tax Division, Washington, D.C., for the defendant-appellant.

John D. Lowery, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington, for the plaintiff-appellee.

Paul J. Sax, Orrick, Herrington & Sutcliffe, L.L.P., San Francisco, California, for the amici curiae.

JUDGES: Before: William C. Canby, Jr. and Stephen Reinhardt, Circuit Judges, and Jane A. Restani,[1] Judge, United States Court of International Trade. Opinion by Judge Canby.

OPINION BY: WILLIAM C. CANBY, JR.

CANBY, Circuit Judge:

The United States appeals two summary judgment rulings by the district court, which we review de novo. See *Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997)*. The rulings came in the course of Airborne Freight Corporation's tax refund suit. The first one overturned the Commissioner's determination that Airborne had improperly deducted contributions paid to several qualified multi-employer defined-benefit pension plans after the end of the taxable years in issue, pursuant to *26 U.S.C. § 404*(a)(6) (1986). We reverse this decision on the authority of *Lucky Stores, Inc. v. Commissioner of Internal Revenue, 153 F.3d 964, 1998 U.S. App. LEXIS 20299 (1998)*, filed simultaneously with this opinion.

The United States also appeals the district court's ruling that Airborne was entitled to investment tax credits, pursuant to *26 U.S.C. § 204*(a)(7), for property that it placed in service in 1989 and 1990 in its world headquarters building. We conclude that Airborne was entitled to investment tax credits, but only for property

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[1] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

that had a class life of at least seven years. Accordingly, we vacate this portion of the district court's judgment, and remand.

DISCUSSION

I. Deductions for Contributions to Multi-Employer Defined-Benefit Pension Plans

Pursuant to collective bargaining agreements, Airborne paid monthly contributions to several qualified multi-employer defined-benefit pension plans ("CBA plans") on behalf of its unionized employees. The amount of contribution due the plans from Airborne in any given month depended upon the number of hours worked by covered employees at particular rates of pay. Employers, whether on a cash or accrual basis, may deduct contributions to qualified pension plans in the taxable year when the contributions were actually paid. See *26 U.S.C. § 404*(a). An exception to this rule provided that:

> a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

26 U.S.C. § 404(a)(6).

Prior to 1989, Airborne deducted the twelve monthly contributions attributable to employee service during a particular taxable year from its taxable income for that same year. The twelfth payment was normally made after the end of the taxable year, pursuant to § 404(a)(6). Airborne then changed its practice. On its 1989 tax return,

filed in September 1990, Airborne deducted the contributions that were based on employee service for the twelve months in 1989 plus the contributions for the first eight months in 1990. The effect of this change was to accord Airborne a one-time benefit of an additional deduction of an average of seven months' contributions. On its 1990 tax return, filed in September 1991, Airborne deducted the contributions for the last four months in 1990 plus the first eight months in 1991, for a total of twelve months' contributions. The Commissioner disallowed the deductions of $6,365,860 on Airborne's 1989 return that were based on contributions resulting from hours worked in 1990, and disallowed deductions of $491,036 on Airborne's 1990 return that resulted from hours worked in 1991. Airborne paid the tax and sued for a refund in district court. The district court granted Airborne's motion for summary judgment, and the United States now appeals.

Our decision on this issue is controlled adversely to Airborne by our decision in *Lucky Stores, Inc. v. CIR, 153 F.3d 964, 1998 U.S. App. LEXIS 20299 (1998)*, which deals with the identical issue and was filed simultaneously with our decision in this appeal.[2] In Lucky Stores, we concluded that employer contributions to CBA plans that were paid after the end of the taxable year and were based on employee hours worked after the end of the taxable year could not be considered as paid "on account of" that taxable year. Accordingly, we now conclude that

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[2] We heard arguments in Lucky Stores on the same day that we heard the arguments in this appeal.

the district court erred when it determined that Airborne's contested deductions for such contributions were proper.

II. The World Headquarters Exception to the Repeal of the Investment Tax Credit

Prior to 1986, taxpayers could receive an income tax credit for up to 10 percent of investment in certain tangible and depreciable property, such as leasehold improvements, equipment, and furnishings. Taxpayers were eligible for the tax credit in the year that the property was placed in service. The Tax Reform Act of 1986 generally repealed the investment tax credit for property placed in service after December 31, 1985. Pub. L. No. 99-514, § 211(a), 100 Stat. 2085, 2166 (1986) (codified at *26 U.S.C. § 49*(a) (1986)).[3] The Act created an exception from the repeal, however, for certain types of "transition property," including property falling within the "world headquarters" exception. See Pub. L. No. 99-514, § 204(a)(7).[4] That exception applied to:

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[3] Congress subsequently amended § 49 when it eliminated expired or obsolete investment tax credit provisions from the Tax Reform Act of 1986. Congress simultaneously resurrected the investment tax credit for expenditures for building rehabilitation, for equipment related to solar and geothermal power, and for reforestation. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11813(a), 104 Stat. 1388 (1990). Those amendments do not affect this case.

[4] Throughout part II of this opinion, citations to § 49 refer to *26 U.S.C. § 49* (1986). All other section citations refer to Pub. L. No. 99-514, 100 Stat. 2085 (1986).

reasonable leasehold improvements, equipment, and furnishings placed in service by a lessee . . . if –

(A) the lessee . . . is the original lessee of each building in which such property is to be used,

(B) such lessee is obligated to lease the building under an agreement to lease entered into before September 26, 1985, and such property is provided for such building, and

(C) such buildings are to serve as world headquarters of the lessee. . . .

Id.

Airborne claimed investment tax credits for property that it placed in service in its headquarters building during 1989 and 1990. Airborne correctly asserts that it qualifies for the exception under its plain words: (A) Airborne is the original lessee of its building; (B) it was obligated to lease the building prior to September 26, 1985 (actually in 1983) and the property in issue is for that building; and (C) Airborne's building was to serve, and does serve, as its world headquarters.

The government argues, however, that the exception must be construed very narrowly, in light of the circumstances of its passage. Congress enacted § 204(a)(7) to allow the firm of Merrill Lynch to claim investment tax credits for property placed in service in its new world headquarters because Merrill Lynch had agreed to lease the new building in reliance on the old law. See *United States v. Kjellstrom, 916 F. Supp. 902, 905-07 (W.D. Wis. 1996);* 131 Cong. Rec. 35285 (1986) (statement of Rep. Gingrich); 131 Cong. Rec. 14113 (1986) (statement of Sen. Metzenbaum). Consequently, the requirements of

§ 204(a)(7) reflect Merrill Lynch's particular circumstances. The government argues that it is inappropriate to extend the exception beyond those circumstances. Thus, it argues that the exception should apply to taxpayers who were obligated to lease the building before September 26, 1985, but had not leased the building by that date. It also argues that, to qualify, the taxpayer must have agreed to lease the entire building. If these narrow constructions are not adopted, according to the government, the purpose of the exception will be frustrated: taxpayers who agreed to lease and leased buildings decades before the repeal of the investment credit will be entitled to avail themselves of the transitional exception.

The difficulty with the government's argument is that none of the words italicized in the previous paragraph were written into § 204(a)(7). There is no disqualification of those who executed leases before September 26, 1985, and the government offers no reason why the execution of a lease creates a relevantly different condition from that which existed under an agreement to lease.

There is also no requirement that the whole building be leased. Although Airborne initially agreed to lease only about 75% of the building, it also acquired options to lease the remaining space. Airborne ultimately exercised it options so that it currently occupies the entire building, and no other tenant has ever occupied any part of the building. Further, Airborne maintains that it always intended to lease the entire building; the vacant space merely provided room for future growth. Under these circumstances, we conclude that Airborne entered into an agreement to lease "the building" for the purposes of § 204(a)(7).

We decline therefore to write the government's additional proposed restrictions into the statute in order to confine the exception virtually to a class of one. We have no quarrel with the government's argument that, in light of its purpose, the exception should be available only to those whose expectations at the time they undertook their obligations would otherwise be defeated by the repeal of the investment credit. Airborne qualifies, however, under such a guiding principle.

Airborne, like Merrill Lynch, entered into an agreement to lease a new world headquarters prior to September 26, 1985. Both companies relied on the availability of the investment tax credit when they contracted to lease their new buildings. Airborne, like Merrill Lynch, was unable completely to occupy and equip its building prior to the repeal of the investment tax credit. Airborne thus falls within the spirit as well as the letter of § 204(a)(7).

Our conclusion that Airborne meets the requirements of § 204(a)(7) is not likely to open the floodgates envisioned by the government. Other companies that leased their world headquarters decades ago cannot have had their expectations defeated as they entered and originally equipped their buildings long before the repeal of the investment credit. Moreover, the opportunity for other taxpayers to take advantage of the world headquarters exception expired, at the latest, on January 1, 1991. See § 203(b)(2)(A). The exception remains a narrow and temporally limited one.

A. The World Headquarters Exception Only Applied to Property With at Least a Seven Year Class Life

As we have stated, Congress excepted "transition property" from the general repeal of the investment tax credit. See §§ 49(b)(1), (e). Property described in the world headquarters exception generally qualifies as transition property. See § 204(a)(7). Congress imposed a number of requirements, however, for transition property to qualify for the investment credit. One such restriction is set forth in § 203, which provides in pertinent part:

(b) General Transitional Rule. –

(2) Requirement that certain property be placed in service before certain date. –

(A) In General –. . . . Paragraph (1) and section 204(a) . . . [which includes the world headquarters exception] shall not apply to any property unless such property has a class life of 7 years and is placed in service before the applicable date determined under the following table:

In the case of property with a class life of:	The applicable date is:
At least 7 but less than 20 years	January 1, 1989
20 years or more	January 1, 1991

. . . .

(C) Class Lives. –

. . . .

(ii) property described in section 204(a) shall be treated as having a class life of 20 years. . . .

Pub. L. No. 99-514, § 203(b)(2).

This section is not a model of clarity, but we read the opening restriction of subsection (A), standing alone, as requiring that the world headquarters exception not be available to property with a class life of less than 7 years. The plain words dictate that reading. The difficulty arises from subsection (C)(ii), which assigns to property described in § 204(a) a class life of 20 years. The district court read subsection (C)(ii) as establishing a 20-year class life for all § 204(a) property, thus entirely negating the 7-year-minimum requirement of subsection (A) of § 203(b)(2). We conclude that a more appropriate reading of subsection (C)(ii) is to consider it as "treating" § 204(a) property (which must have a class life of 7 years or more) as having a 20-year life for the purpose of the applicable date by which it must be placed in service – January 1, 1991. We recognize that this interpretation may negate the provision of subsection (A) with regard to such property with a life of at least 7 but less than 20 years. The district court's interpretation does even more violence to subsection (A), however, because it negates not only the same provision, but virtually all of subsection (A).

Our interpretation of § 203 is made more compelling by the fact that § 203 does not stand alone. It is supplemented by § 49(e)(1)(C), which provides in pertinent part:

(C) In the case of transition property with a class life of less than 7 years –

(i) section 203(b)(2) of this Act shall apply, and

(ii) in the case of property with a class life –

(I) of less than 5 years, the applicable date shall be July 1, 1986, and

(II) at least 5 years, but less than 7 years, the applicable date shall be January 1, 1987. . . .

26 U.S.C. § *49*(e)(1)(C). Here again, the draftsmanship leaves much to be desired, but the most reasonable reading of this subsection is that it renders additional property eligible for the investment credit, and for practical purposes adds it to the table of class lives and service dates contained in § 203(b)(2).[5] See H.R. Conf. Rep. No. 99-841, 99th Cong. 2d Sess., at II-54. If the district court's reading of subsection 203(b)(2)(C) were accepted, however, it would give all § 204(a) property a life of 20 years and entirely negate the above provisions of § 49(e)(1)(C).[6] We adhere to our conclusion, therefore, that the only effect of subsection (C)(ii) of § 203(b)(2) is to make applicable to eligible property with a class life of more than 7 years the required service date applicable to property with a class life of 20 years or more – January 1, 1991.

Therefore, Airborne is entitled to an investment tax credit for eligible property that it placed in service in its world headquarters during 1989 and 1990, but only if the property had a class life of at least seven years. See *United*

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[5] Airborne's eligibility for credits under § 49(e) is not in issue, because this appeal concerns only property placed in service in 1989 and 1990, well after the dates required by § 49(e) for property having a class life of less than 7 years.

[6] Airborne contends that § 49(e)(1)(C) would still have a function because it could apply to the different type of transition property described in § 203(b)(1). But § 203(b)(1), like § 204(a), is rendered inapplicable by § 203(b)(2)(A) to property with a class life of less than 7 years. There is no reason why § 49(e)(1)(C) should be effective in one context but not in another, when both are governed by the same clause of § 203(b)(2)(A).

States v. Kjellstrom, 916 F. Supp. 902, 908-09 (W.D. Wis. 1996). Accordingly, we remand to the district court so that it may determine what portion of the property that Airborne placed in service in those years qualifies under the world headquarters exception.

CONCLUSION

Airborne was not entitled under *26 U.S.C. § 404*(a)(6) to deduct contributions paid to multi-employer defined-benefit CBA pension plans after the end of the taxable year, when those contributions were based upon hours worked by covered employees after the end of the taxable year. We therefore reverse the district court with regard to that issue.

Eligible property that Airborne placed in service in its headquarters building during 1989 and 1990 qualifies under the world headquarters exception to the general repeal of the investment tax credit, provided that the property had at least a seven year class life. Accordingly, we affirm the district court's ruling that the world headquarters exception applies, but reverse its decision that transition property with a class life of less than 7 years qualified for the exception. We therefore vacate the portion of the district court's judgment relating to that exception and remand for further proceedings.

Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCKY STORES, INC. AND SUBSIDIARIES, *Petitioner-Appellant,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	No. 97-70810 Tax Ct. No. 4446-93 OPINION

Appeal from a Decision of the
United States Tax Court
Arthur L. Nims, III, Tax Court Judge, Presiding

Argued and Submitted
March 12, 1998 – San Francisco, California

Filed August 20, 1998

Before: William C. Canby, Jr. and Stephen Reinhardt, Circuit Judges, and Jane A. Restani,[1] Judge, United States Court of International Trade

Opinion by Judge Canby

COUNSEL

Paul J. Sax, Orrick, Herrington, & Sutcliffe, L.L.P., San Francisco, California, for the petitioner-appellant.

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[1] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

Steven W. Parks, United States Department of Justice, Tax Division, Washington, D. C., for the respondent-appellee.

OPINION

CANBY, Circuit Judge

This case requires us to interpret 26 U.S.C. § 404(a)(6), which concerns the timing of income tax deductions for contributions paid to multi-employer defined-benefit pension plans. Lucky Stores, Inc. ("Lucky") appeals the judgment of the Tax Court upholding the Commissioner's assessment of tax deficiencies. The Tax Court sustained the deficiencies because it concluded that Lucky had improperly deducted contributions to several defined-benefit pension plans that were paid after the end of the taxable year. *Lucky Stores, Inc. v. CIR*, 107 T.C. 1 (1996), *supplemented on denial of reconsideration*, T.C. Memo. 1997-70, 1997 WL 51211 (1997). We review de novo the Tax Court's conclusions of law, and review for clear error its factual findings. *See Condor Int'l, Inc. v. CIR*, 78 F.3d 1355, 1358 (9th Cir. 1996). We affirm the decision of the Tax Court.[2]

I

Pursuant to various collective bargaining agreements, Lucky paid monthly contributions to several qualified multi-employer defined-benefit pension plans

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[2] This case was argued along with *Airborne Freight Corp. v. United States*, No. 97-35129, ___ F.3d ___ (1998), which presents the identical issue, among others. The opinion in *Airborne* was filed simultaneously with this opinion.

("CBA plans") on behalf of its unionized employees. CBA plan administrators pooled contributions from the participating employers into a single fund to provide benefits for covered employees, former employees, and their beneficiaries. The amount of Lucky's required contributions varied from month to month, depending on fluctuations in the number of Lucky's covered employees and the total hours or weeks of service performed by those employees during each month.

II

In general, employers may deduct contributions to qualified pension plans in the taxable year during which the contribution is actually paid, regardless of whether the employer uses an accrual or a cash-basis method of accounting. *See* 26 U.S.C. § 404(a)(1); 26 C.F.R. § 1.404(a)-1(c). An exception to this rule provides that:

> a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

26 U.S.C. § 404(a)(6).

Prior to 1986, Lucky deducted a total of twelve monthly contributions attributable to employee service during a particular taxable year from its taxable income for that same year. The twelfth payment was made after the end of the taxable year, but was attributed to the previous year as a payment "on account of" that year pursuant to § 404(a)(6). Then, for its taxable year ending

on February 2, 1986, Lucky changed its practice. Lucky obtained an extension of time and filed its timely return on or about October 15, 1986. On that return, it attributed to the taxable year ending February 2, 1986, not only the monthly payments made later in February to the various CBA plans, but also the payments made each month thereafter up to October 1986. It did so on its claim that it was making these payments "on account of" the prior taxable year. Lucky thus sought to achieve a one-time benefit of the additional deductions of seven or eight months, added to the usual twelve.[3] The extra deductions totaled $36,661,529. It is these deductions that were disallowed by the Commissioner and the Tax Court.

III

The plain meaning of § 404(a)(6) supports the Tax Court's decision. The first payment that Lucky made after the end of the 1986 taxable year was clearly "on account of" that year because the payment was required under the collective bargaining agreements for hours worked by covered employees during the final month of the taxable year. The following seven or eight payments were required to be paid because of work done during the taxable year ending in 1987, not the previous year. The bare language of the statute precludes the deduction of those payments on the 1986 return.

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[3] The benefit was one-time, of course, because in the future Lucky could not, and did not, deduct payments for which a deduction had been claimed in an earlier year. Subsequent deductions were thus limited to twelve per taxable year.

Lucky's contention that it may deduct the additional payments in 1986 is based upon Revenue Ruling 76-28, which provides in pertinent part that, if the employer claims payments as deductions in the prior taxable year:

> [A] payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer. . . .

Rev. Rul. 76-28, 1976-1 C.B. 107.[4] Lucky insists that the last seven or eight payments that it attributed to the 1986 taxable year were necessarily treated the same as if they had been received on the last day of the 1986 taxable year, because the plans to which it contributes are all defined-benefit plans. A defined-benefit plan, unlike a defined-contribution plan, does not maintain individual accounts for each employee which require precise accounting for the date and amount of contribution. In the defined-benefit plans to which Lucky contributes, the worker's pension is calculated according to a formula based on years worked and highest salary maintained over a particular period. Because the employer's contribution has no direct relation to the workers' benefits, the contributions are simply placed in one common pool to fund the

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[4] Although revenue rulings do not have the force of law, they "do constitute a body of experience and informed judgment to which courts may properly resort for guidance in the interpretation of relevant revenue statutes and regulations." *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983).

entire plan. Thus, Lucky argues, all contributions are treated the same no matter when they are received. Its last seven or eight contributions are thus deductible, according to Lucky, under Rev. Rul. 76-28 because they were treated by the plan in the same manner as they would have been treated if received on the last day of the 1986 taxable year.

Where and how the money is deposited, however, reflects only one aspect of its treatment. In focusing solely on that factor, Lucky ignores the procedures that employers and administrators use to determine contribution amounts, as well as the process of accounting for contributions to ensure that employers keep pace with their obligations to the plans. The parties do not dispute the Tax Court's findings that, under the terms of the relevant collective bargaining agreements, Lucky was required to make contributions to the CBA plans near the end of each month. *Lucky Stores, Inc.*, 107 T.C. at 3. The amounts of the contributions were determined by the hours or weeks of employee service that were rendered during the immediately preceding month. *Id.* at 4. Plan administrators monitored the dates of receipt for the monthly contributions, and were empowered to levy interest charges and late fees on delinquent accounts. *Id.* at 5. Moreover, plan administrators were not prepared to process contributions that were in excess of the required amounts, and Lucky made no such advance contributions. *Id.* at 6. Plan administrators treated each remittance as the fulfillment of Lucky's required contribution for a discrete month. Thus the seven or eight contributions in issue were treated by the plans as payments satisfying Lucky's obligations in 1987, which is not the same as they

would have been treated if received on the last day of the 1986 taxable year. Lucky does not meet the requirement of Rev. Rul. 76-28.[5]

As the government points out, the Tax Court decision serves the purposes of § 404(a)(6). The original period of grace provided by that section was sixty days, which Congress later extended because of the difficulty taxpayers experienced in calculating the maximum deductible contribution for the expired taxable year. *See Don E. Williams Co. v. C.I.R.*, 429 U.S. 569, 575-76 (1977). For multi-employer plans, § 413(b)(7) provides that, for purposes of establishing the maximum deduction under § 404(a), the contributions of all employers shall be treated as made by a single employer. An employer's contribution is considered not to exceed the limit "if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan are determined) do not exceed such limitation." *Id.* As the government argues and the Tax Court recognized, plan administrators could not arrive at meaningful figures for

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[5] Lucky relies on several private letter rulings and one technical advice memorandum of the Internal Revenue Service as establishing a practice of the IRS permitting deductions such as those claimed by Lucky. Taxpayers other than those to whom such rulings or memoranda were issued are not entitled to rely on them. *See Norman Corp. v. District Director of Internal Revenue*, 446 F.2d 1374, 1375 (9th Cir. 1971); *Minchin v. Commissioner*, 335 F.2d 30, 32-33 (2d Cir. 1964); Rev. Proc. 90-2, 1990-1 Cum. Bull. 386, 398. Nor could the IRS establish a binding practice in conflict with § 404(a)(6).

anticipated contributions if employers were able to attribute to a taxable year payments based on work performed after that year. Lucky counters that the plan administrators' projections under § 413(b)(7) ought not to include payments "deemed" to be made during the taxable year, and that its allocation of extra payments to the taxable year therefore will not upset the scheme of § 413(b)(7). In our view, the government has the better of this argument. We need not rule on the issue, however, because we do not regard it as determinative. The reason that Lucky's additional payments were disallowed is not that they exceeded the calculated maximum allowable deduction for 1986; they were disallowed because they were not paid during the 1986 taxable year, as required by § 404(a)(1)(A), and they did not meet the conditions of § 404(a)(6) for an exception to that requirement. Lucky's disputed payments were not "on account of" its 1986 taxable year, and the Tax Court properly upheld their disallowance.

IV

Lucky asserts that the Tax Court abused its discretion in denying reconsideration. It does not support this contention with argument, and we reject it.

Lucky also contends that the Tax Court erred in rejecting its request to take judicial notice. We find no merit in the contention. The matter submitted by Lucky included non-noticeable material, *see* Fed. R. Evid. 201, and also included private letter rulings and technical advice memoranda upon which Lucky was not entitled to rely. *See* note 4, supra. The Tax Court considered and

rejected Lucky's written request; Lucky was not entitled to a formal hearing under Fed. R. Evid. 201. *See Allen v. Los Angeles*, 92 F.3d 842, 848 n.7 (9th Cir. 1996), *overruled on other grounds, Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997).

V

The judgment of the Tax Court is, in all respects, **AFFIRMED.**

APPENDIX C

Airborne Freight Corporation, Plaintiff v. United States of America, Defendant.

No. C95-301R

United States District Court for the Western District of Washington

November 6, 1995, Dated
November 7, 1995, Filed, Entered

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

ROTHSTEIN, District Judge: THIS MATTER comes before the court on cross-motions for summary judgment by plaintiff Airborne Freight Corporation and defendant United States of America.[1] Having reviewed the motions together with all documents filed in support and in opposition and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves the issue of whether plaintiff Airborne Freight Corporation ("AFC") can claim certain deductions pursuant to the Internal Revenue Code for contributions made to several multi-employer defined benefits pension plans. As an employer subject to various collective bargaining agreements, AFC contributes to the

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[1] Defendant's motions for leave to file overlength response and reply briefs are GRANTED.

plans on a monthly basis at a set rate for specific units of work performed by union employees.

For the tax years ending December 31, 1989 and December 31, 1990, AFC obtained extensions of the time to file its tax returns until September 15, 1990 and September 15, 1991, respectively. On its 1989 return, AFC claims deductions for all contributions made to the multi-employer plans during the 1989 calendar year and during the 8½ month period from the end of calendar year 1989 until the extended due date for the 1989 return. On its 1990 return, AFC claimed deductions for all contributions made to the plans from September 16, 1990 through September 15, 1991. The periods between the end of the calendar year and the extended date of filing of the tax returns will hereafter be referred to as the grace periods.

The Internal Revenue Service ("IRS") disallowed all deductions claimed by AFC on these two tax returns for multi-employer plan contributions, which were paid during the grace periods after the end of the calendar years for which the returns were filed. AFC filed this lawsuit on the grounds that it is entitled to receive a refund of the amount paid to the IRS as a result of the disallowance of the deductions claimed for those contributions made during the grace periods. There is no dispute about the material facts, and both AFC and the IRS have filed cross-motions for summary judgment.

II. LEGAL ARGUMENT

A. IRC § 404 and IRS Revenue Ruling 76-28

The deduction of employer contributions to pension plans is governed by § 404 of the Internal Revenue Code ("IRC"). Section 404(a)(6) provides that contributions made to a qualified plan after the close of the employer's tax year, but prior to the extended due date for filing the employer's tax return for that year, are deemed made on the last day of the preceding tax year and are accordingly deductible under § 404(a)(1) if they are made on account of the preceding taxable year.

No regulations interpreting § 404(a)(6) have been issued. However, the IRS has issued Revenue Ruling 76-28, which includes some guidelines for applying § 404(a)(6). That ruling states that employer payments made to a qualified plan after the end of the tax year will be considered to have been made "on account of" the preceding taxable year within the meaning of § 404(a)(6) if (1) the plan treats the payment as it would treat a payment actually received on the last day of the preceding taxable year; and (2) the employer designates the payment in writing to the plan as made on account of the preceding taxable year, or deducts the payment on its tax return on or before the due date of that return, including extensions.

There is no dispute that AFC has met the second requirement. The question is whether the first requirement has been satisfied. Given the nature of multi-employer defined benefits plans and the way in which they operate, the court concludes that it has. The plan treated the contributions which AFC made during the

grace periods just as it treated contributions made before the end of the taxable year. That is, the plan deposited the contributions in one single pooled fund. Neither the amount of the contributions nor the timing, *i.e.*, whether they were made before the end of the tax year or during the succeeding grace period, affected the actual benefits payable to employees.[2]

Thus, the court finds that AFC's actions in claiming deductions for the contributions made during the grace periods are consistent with the language and requirements of § 404(a)(6) as well as satisfying the IRS's own guidelines for applying § 404(a)(6) set forth in Rev. Rul. 76-28.

B. Other IRC Provisions

In order to refute AFC's argument, the IRS invokes several other IRC provisions including § 446, which requires a taxpayer to obtain the IRS Commissioner's

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[2] In the same vein, the IRS contends that the pension contributions paid in 1990 were not "on account of" the 1989 tax year as required by § 404(a)(6) because the amount of those contributions was calculated based on employee hours worked in 1990, not in 1989. While this is true, the court again notes that there is no connection between the amount of the contributions and the level of benefits paid or to whom they are paid. Thus, the actual date on which the contributions were made and the employee hours on which they were calculated does not affect the plan's payment of benefits. Rev. Rul. 76-28 allows the taxpayer to treat contributions to its pension plan during the grace period as having been made "on account of" the preceding tax year if the taxpayer meets the requirements of that ruling. The court has already found that AFC did so.

approval when changing its method of accounting. The IRS argues that AFC's decision to claim payments made in 1990 as deductions for the tax year ending December 31, 1989 was a change in accounting method for which AFC had to get prior permission from the IRS Commissioner under § 446(e).

The court rejects this argument. AFC's decision to claim certain deductions on its 1989 rather than its 1990 tax return does not constitute a change in accounting methods because it does not affect the computation of the deduction amount or the limit on the deduction. Instead, AFC's decision was purely one of timing as allowed by Congress under § 404(a)(6).

The IRS also cites to IRC § 446(b), which gives the Commissioner discretion to require the taxpayer to use a different accounting method if the Commissioner concludes that the taxpayer's method does not clearly reflect income. As stated above, the court does not believe that an accounting method is involved in this case. Moreover, Congress specifically provided in § 404(a)(6) that a taxpayer is authorized to claim deductions in the manner outlined by the statute.

The IRS's final argument is predicated on the fact that there is a plan-wide deductible limit under IRC § 413(b)(7). In other words, all of the deductions taken by all of the employers contributing to one multi-employer plan cannot exceed a plan-wide limit. This limit is calculated by determining the anticipated contributions for the plan year from all contributing employers. The IRS argues that by taking more of a deduction for the 1989 tax year than had been anticipated, AFC interfered with

other employers' ability to estimate the plan-wide deductible limit.

This argument has no merit. The IRS concedes that AFC claimed the disputed deductions only after having calculated the plan-wide deductible for the 1989 tax year and having ascertained that it would not be exceeded. Because AFC's ability to claim additional deductions was predicated on the fact that it filed its 1989 tax return well after the end of the tax year, it could not have interfered with other employers' ability to calculate and claim their deductions unless they also obtained extensions on the time for filing their tax returns. It seems only fair to require that those employers who choose to file their tax returns later must accept the risk of possible limitations on their ability to claim deductions.

III. CONCLUSION

AFC'S motion for summary judgment is GRANTED; the IRS's cross-motion for summary judgment is DENIED.

APPENDIX D

FOR PUBLICATION

UNITED STATES TAX COURT

LUCKY STORES, INC., AND SUBSIDIARIES, PETITIONER *v.* COMMISSIIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 4446-93. Filed August 6, 1996.

Barry W. Homer, Eric W. Jorgensen, and Grady M. Bolding, for petitioner.

Alan Summers, Kevin G. Croke, and Elizabeth L. Groenewegen, for respondent.

NIMS, *Judge:* Respondent determined the following deficiencies in petitioner's Federal income tax:

FYE	*Deficiency*
Jan. 30, 1983	$ 8,797,328
Feb. 3, 1985	2,175,135
Feb. 2, 1986	48,255,017

Unless otherwise indicated, all section references are to sections of the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

This case involves a number of issues. The only issue to be resolved in the present proceeding is petitioner's claim to a deduction for union-negotiated pension plan contributions for the taxable year ended February 2, 1986. The amount of the disputed deduction is $36,661,529.

Most of the facts have been stipulated and are so found.

Petitioner is a Delaware corporation. At the time the petition was filed, petitioner's principal place of business was located in Dublin, California.

FINDINGS OF FACT

At all relevant times, petitioner was subject to SEC public financial reporting and other requirements and, along with its subsidiaries, operated retail grocery stores located throughout California and Nevada. Petitioner requested and received from the Internal Revenue Service an extension to October 15, 1986 within which to file its U.S. consolidated corporate income tax return for the fiscal year ended February 2, 1986 (the Current Taxable Year). The return was timely filed.

Under applicable Internal Revenue Code provisions, employers are permitted to enter into "qualified" deferred compensation arrangements to provide retirement and other benefits to employees and their beneficiaries through single employer plans, multiple employer plans, and multiemployer plans. Plans that are not established or maintained pursuant to collective bargaining agreements are herein for convenience referred to as Multiple Employer Plans. Plans that are established and maintained pursuant to collective bargaining agreements are herein for convenience referred to as CBA Plans, or, on occasion, as "multiemployer pension plans". In both Multiple Employer Plans and CBA Plans, the contributions of the participating employers are pooled and used to provide the benefits of all the covered employees, former employees, and their beneficiaries. Section 413(b) contains certain rules exclusively applicable to CBA

Plans. Section 413(c) contains certain rules applicable to Multiple Employer Plans. The plans involved in this case are CBA Plans, subject to section 413(b).

Under single employer plans, only the employees and former employees of the single employer and their beneficiaries are eligible to receive retirement or other benefits under the plan. For this purpose, employers who are within a controlled group of entities, or under common control (all within the meaning of section 414(b) and (c)) are treated as a single employer for purposes of section 401.

At all relevant times, petitioner was required to and did contribute money to 29 CBA Plans. These plans were defined benefit pension plans. The following schedule sets forth the six largest of the CBA Plans to which petitioner made contributions (the Six Large CBA Plans) and their annual accounting periods (Plan Years) for Federal tax purposes:

CBA Plan	*Plan Year*
Northern California Retail Clerks Union and Food Employers Joint Pension Plan	1/1–12/31
California Butchers Pension Trust Fund	7/1–6/30
UFCW Midwest Pension Fund December	12/1–11/30
Western Conference of Teamsters	1/1–12/31
Central States SESW	1/1–12/31
Southern California UFCW	4/1–3/31

Contributions to each CBA Plan that were attributable to covered hours or weeks worked in a given month were due on the 20th of the month following the month

in which the hours were worked or compensated for. (The parties stipulated that contributions were due on the 30th of each month, but in her testimony Sandra Turpen, the administrator of the Northern California Retail Clerks' Employer Benefit Fund, gave the more precise statement of the due date for contributions.) An account was considered delinquent if the payment was not received by the last day of the month.

During the calendar years 1985, 1986, and 1987, more than one thousand employers made contributions to the CBA Plans on behalf of thousands of unionized employees and their beneficiaries. At all times between January 1, 1985 and December 31, 1987 (the relevant period), each of the CBA Plans qualified as a multi-employer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and was a plan to which section 413(b) and Subtitle E of Title IV of ERISA applied. At all times during the relevant period, each of the CBA Plans was qualified under section 401(a) as a pension plan and, accordingly, the trusts related to each CBA Plan were exempt from taxation under section 501.

As of the end of each month, petitioner calculated the amount that it was required to contribute to each CBA Plan attributable to covered hours or weeks worked during such month. Petitioner multiplied the number of hours or weeks of work in such month by covered employees times a monetary rate set by the collective bargaining agreement. Increases or decreases in the number of covered employees along with increases or decreases in the hours or weeks worked by covered employees required petitioner (and each of the other

contributing employers) to make a separate calculation for its required contribution to each Plan month by month.

For all taxable years ending before the Current Taxable Year, petitioner computed its deduction for contributions to the CBA Plans in the following manner: for each CBA Plan petitioner added the 12 monthly contribution amounts attributable to covered hours or weeks worked during a given taxable year and claimed that total amount as a deduction for that year. For every taxable year ending before the Current Taxable Year, the total amount claimed as a deduction for a taxable year did not include any contributions attributable to hours or weeks worked after the end of such year.

For its Current Taxable Year, petitioner computed its deduction for contributions to the CBA Plans claimed on its return in the following manner: petitioner added together the 12 monthly contribution amounts attributable to covered hours or weeks worked between February 3, 1985 and February 2, 1986, and also added the 8 monthly contributions attributable to covered hours or weeks worked from February 3 through August 31, 1986 and made before October 15, 1986 (the date on which petitioner filed its return for the Current Taxable Year). In addition, as to certain of the CBA Plans and bargaining units, the dates were February 3 through September 30, 1986, in which case there were nine monthly contributions instead of eight. Thus petitioner claimed a deduction for 19 – in some cases 20 – monthly contributions on the Current Taxable Year return.

For fiscal years ending after February 2, 1986, petitioner did not deduct any amounts which had been previously deducted on its Federal income tax return for any prior year. For fiscal years ending after February 2, 1986, petitioner claimed a deduction for no more than 12 monthly contributions in any such fiscal year. The record does not disclose the number of monthly contributions claimed by petitioner for deduction purposes on its Federal income tax return for the taxable year next succeeding the Current Taxable Year.

The $36,661,529 in dispute consists of $31,427,131 of contributions to the Six Large CBA Plans, and $5,234,398 to the 19 smaller plans. In the notice of deficiency, respondent did not disallow the 12 monthly contributions totaling $57,139,406 that petitioner made to the CBA Plans for hours or weeks worked by its covered employees in the Current Taxable Year and deducted on petitioner's return for the Current Taxable Year. The $57,139,406 consists of $48,395,987 of contributions to the Six Large CBA Plans and $8,743,419 to the 19 smaller plans. In addition, out of the total $96,890,058 deduction claimed by petitioner in the Current Taxable Year, respondent did not disallow $3,089,123 of contributions to certain profit-sharing plans.

Petitioner has never filed Form 3115 (Application for Change in Accounting Method) concerning the method it used to arrive at its deduction for contributions to the CBA Plans claimed on its return for the Current Taxable Year.

The administrator of each CBA Plan was a party independent of petitioner. The administrator of each CBA

Plan was appointed by the Board of Trustees of the Plan, one-half of whom are selected by the employers and the other one-half of whom are selected by the union locals. Under the terms of the collective bargaining agreements, the CBA Plans were entitled to collect interest and/or late fees on delinquent contributions from employers. At all times during the relevant periods, each CBA Plan administrator had in place procedures to monitor the actual dates of receipt of each contributing employer's required contribution.

As required by ERISA sections 104 and 4065 and sections 6057(b) and 6058(a), after the close of each plan year the administrator of each CBA Plan filed Annual Reports (Forms 5500) and accompanying schedules with the IRS. On Schedule B of Form 5500, each CBA Plan reported for each plan year only those contributions paid under the applicable collective bargaining agreement for hours or weeks worked during that particular plan year. Petitioner's monthly contributions to each CBA Plan were reported by each CBA Plan on Schedule B of Form 5500 for that plan year in which the related hours or weeks of the covered employees had been worked. Schedule B of Form 5500 is required to be filed only with respect to a defined benefit plan that is subject to the minimum funding standards of section 412 and ERISA section 302, 88 Stat. 869, and one purpose of the completion of the Schedule B is to demonstrate compliance or noncompliance with such minimum funding standards.

There was no provision in any of the collective bargaining agreements prohibiting petitioner from contributing more than the amount required under the agreements or contributing amounts in advance of the date that such

amounts became due. There was no provision in any of the collective bargaining agreements which explained how the plan administrator was supposed to handle or credit an amount received from an employer that was not earmarked as a contribution then due under the collective bargaining agreement. However, no contributions were made by petitioner to any of the CBA Plans during the relevant period that were not required by any relevant collective bargaining agreement. Petitioner, for public financial reporting purposes, accounted for its monthly contributions to the CBA Plans attributable to hours and weeks worked between February 3 and September 30, 1986 in its financial statements for its fiscal year immediately succeeding its fiscal year ended February 2, 1986.

The taxable year of a contributing employer need not be the same as the plan year of a CBA defined benefit pension plan to which such employer contributes. Administrators of CBA Plans are not required to know the taxable year adopted by contributing employers. Under the terms of the collective bargaining agreements, petitioner was not required to report to the plan administrators the deduction amounts it claimed for contributions.

At all times during the relevant periods, each of the CBA Plans met the minimum funding requirement of section 412 and ERISA section 302. In preparing its funding standard account under section 412 for each plan year, no CBA Plan actuary took into account contributions made by the contributing employers for hours worked by covered employees following such plan year. Under each of the CBA Plans for all relevant periods, the earning, crediting, and vesting of a participant's benefit

by the CBA Plan was independent of the making of any specific contribution by an employer.

The information recorded on Form 5500, Schedule B, for each of the Six Large Plans shows that each of the Six Large Plans had unfunded past service costs and that the actual contributions during the plan year, together with the credit balance in the funding standard account, exceeded the minimum funding requirement for the plan year. Therefore, section 404(a)(1)(A)(iii) was used to calculate the alternative limit for purposes of determining petitioner's entitlement to deduct its contributions to the CBA Plans.

For purposes of section 413(b)(7), the applicable limitation of section 404(a)(1)(A)(iii) with respect to contributions to each of the Six Large CBA Plans for the plan year of such CBA Plan that includes the date February 2, 1986, determined on a plan year basis and as if all participants were employed by a single employer, was as follows:

Plan Year Ended In Tax Year

	Deductible limit	*Contributions*[1]
California Butchers	$ 34,200,292	$ 23,905,300
N. Cal. Retail Clerks	92,985,762	78,946,374
S. Cal. UFCW	103,283,669	85,955,898
Central States SESW	957,945,930	664,202,000
UFCW M W Pension Plan	21,780,509	20,642,880
Western Conf./ Teamsters	567,476,801	478,491,232

Plan Your Begun in Tax Year

	Deductible limit	*Contributions*[1]
California Butchers	$ 31,210,926	$23,026,000
N. Cal. Retail Clerks	85,567,809	84,810,863
S. Cal. UFCW	103,071,886	92,593,714
Central States SESW	909,812,563	725,079,000
UFCW M W Pension Plan	22,500,268	21,053,791
Western Conf./ Teamsters	647,156,505	500,960,586

The amount of total employer contributions actually paid to each of the CBA Plans based on hours and weeks worked by eligible employees during each relevant plan year, as reported on Schedule B for such plan year, is an amount which, as of the beginning of such plan year, the CBA Plan administrator of such CBA Plan could have reasonably estimated or expected to be made by

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[1] Actual contributions during the plan year as recorded on the Form 5500, Schedule B.

employers with respect to hours and weeks worked by covered employees during such plan year.

Petitioner was never notified by any CBA Plan administrator or other CBA Plan representative that the statutory deduction limit was exceeded with respect to any CBA Plan for any relevant period. Petitioner did not notify any CBA Plan administrator or other CBA Plan representative that the monthly contributions attributable to hours and weeks worked after February 2, 1986 were to be applied to months ending on or before February 2, 1986.

For purposes of paying benefits and plan expenses, all contributions to each CBA Plan are pooled and no distinction is made between contributions for any specific time period or contributions made by any particular employer.

Petitioner consulted with the firm of Price Waterhouse regarding the acceleration of deductions for post-tax-yearend contributions to collectively bargained defined benefit pension plans. The parties stipulated that during the relevant period, Price Waterhouse was engaged in marketing that type of acceleration to certain clients and other employers that were making required contributions to multiemployer defined benefit pension plans.

By section 601(a) and (b)(1) of the Tax Reform Act of 1986, Pub.L. 99-514, 100 Stat. 2085, 2249, the top corporate tax rate was reduced from 46 percent to 34 percent for tax years beginning on or after July 1, 1987. See S.Rept. 99-313, at 219, 220-221 (1986) 1986-3 C.B. (Vol. 3) 1, 219, 220-221; H. Conf. Rept. 99-841 (Vol. 2), at II-59 (1986),

1986-3 C.B. (Vol. 4) 1, 59. Income in taxable years that included July 1, 1987 (other than as the first day of such year) was subject to blended rates. *Id.*

OPINION

During the relevant period, petitioner made monthly contributions to 29 CBA Plans on behalf of its unionized employees. For each CBA Plan, the amount of the monthly contribution was the arithmetical result obtained by multiplying the "covered hours worked" (the number of hours worked during the month by employees covered under the respective collective bargaining agreement (CBA)) by the "contribution rate", a dollar amount set forth in the CBA.

For any given taxable year prior to the Current Taxable Year, petitioner deducted the 12 monthly contributions that were calculated from covered hours worked during such year. Then, as to the Current Taxable Year, petitioner changed its method of calculating its deduction. For the Current Taxable Year, petitioner obtained an extension to October 15, 1986, of the time within which to file its return. Between the date on which the Current Taxable Year ended and the due date of the return, as extended, petitioner made eight or in some cases nine monthly contributions to the CBA Plans, and claimed these post-yearend contributions (herein for convenience called "grace period contributions") as a deduction for the Current Taxable Year, in addition to the usual 12 monthly contributions. As to the Current Taxable Year, respondent denied the deduction for the grace period contributions.

Petitioner claims that it is entitled to deduct the grace period contributions currently because they were "on account of" its Current Taxable Year within the meaning of section 404(a)(6), as explicated by Rev. Rul. 76-28, 1976-1 C.B. 106. In an unexpected burst of candor, petitioner admits that it is attempting to deduct, for the Current Taxable Year, "contributions made over a 20-month period".

While section 404(a)(1)(A) states that pension plan contributions are deductible "In the taxable year when paid", section 404(a)(6) provides a grace period in that, in the words of the section, "a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year", subject to the further condition that the payment be made "not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof)."

Petitioner also argues that under section 413(b)(7) its contributions were within the deductible limits of section 404(a) because the "anticipated contributions" for all the CBA Plans for their respective plan years did not exceed any maximum deduction limitation under section 404(a). Moreover, petitioner argues that the grace period contributions were "for the portion of" the Current Taxable Year that ended within the various plan years of the CBA Plans to which it made contributions, because under section 404(a)(6) they were deemed to have been a payment made on the last day of the Current Taxable Year.

Respondent presents several alternative arguments. First, respondent contends that petitioner's longstanding

practice of deducting only contributions calculated from covered hours worked during a given taxable year constituted an accounting method. In order to change to a different accounting method, petitioner was required under section 446(e) to obtain the Commissioner's consent, which was not done. Second, respondent asserts that petitioner's "new method", i.e., that of deducting grace period contributions in the Current Taxable Year, fails to clearly reflect income under section 446(b). And, third, respondent claims that the grace period contributions were not "on account of" petitioner's current tax year within the meaning of section 404(a)(6).

Section 404(a) specifies that employer contributions to exempt trusts under various types of qualified employee benefit plans are not deductible under any other Code provision, but if they would otherwise be deductible, they are deductible under section 404, subject to articulated limitations as to the amount deductible in any taxable year. The limitations on the amount deductible are contained in section 404(a)(1)(A), which also refers to the deduction of contributions "In the taxable year when paid". While section 404(a)(1)(A) provides the limits on the amount that may be deducted, it does not specify the method by which the actual amount of the deduction may be determined.

The applicable limitations on contributions to the CBA Plans in this case are contained in clauses (i) and (iii) of section 404(a)(1)(A), which, in combination, provide that the overall limitation is the greater of the amount necessary to satisfy the minimum funding standard of section 412(a) for plan years ending within the employer's taxable year, and an amount equal to the

normal cost of the plan, augmented by any amount necessary to amortize unfunded costs equally over 10 years.

In addition, the flush language at the end of subparagraph (A) of the foregoing section provides, among other things, that the maximum amount deductible for the taxable year is to be an amount equal to the *full* funding limitation for such year determined under section 412.

Section 404(a)(6) expands somewhat the time of payment provision at the beginning of section 404(a)(1)(A) by providing:

> (6) TIME WHEN CONTRIBUTIONS DEEMED MADE. – For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

As a further refinement of the section 404(a) limitations on the deductibility of contributions, section 413 provides certain rules that apply exclusively to "collectively bargained plans, etc." Section 413(a) provides that subsection (b) applies to any plan (and any trust thereunder) maintained pursuant to a CBA; i.e., a CBA Plan. Various paragraphs of subsection (b) provide rules that relate to CBA Plans, but the relevant paragraph for our present purposes is paragraph (7), which furnishes a road map for applying section 404(a) limitations insofar as they relate to CBA Plans. Section 413(b)(7) provides:

> (7) DEDUCTION LIMITATIONS. – Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were

> employed by a single employer. The amounts contributed to or under the plan by each employer who is a party to the agreement, for the portion of his taxable year which is included within such a plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation. If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions which is not deductible under section 404 shall be determined in accordance with regulations prescribed by the Secretary.

We think petitioner's attempt to use the expanded time of payment provision of section 404(a)(6), as augmented by section 413(b)(7), to enlarge its current contribution deduction is misguided.

The legislative history explains that the purpose of amending section 404(a)(6) was simply to place cash basis taxpayers on the same footing as accrual basis taxpayers insofar as contributions actually paid into the trust after the close of the taxable year are concerned. Before the amendment, only contributions by accrual basis taxpayers made by the time for filing tax returns could be treated as paid in the year for which a return was due. This allowed taxpayers sufficient time after the close of the taxable year to determine the amount of their contributions to be made to the plan. Section 404(a)(6) extends this flexibility to cash basis taxpayers. H. Rept. 93-807, at 101 (1974) 1974-3 C.B. (Supp.) 236, 336.

In addition, the conference report states that the intent of permitting grace period contributions is so that they may relate back to the plan year "for purposes of the minimum funding standards". H. Conf. Rept. 93-1280, at 290 (1974), 1974-3 C.B. 415, 451. There is nothing in the legislative history to suggest that Congress intended to expand the treatment of post-yearend payments beyond extending parity to cash basis taxpayers and making necessary calculations to determine the amount of the contribution.

Petitioner has the burden of proof in establishing that the contributions it seeks to deduct are, in the words of section 404(a)(6), "on account of" the current taxable year. Rule 142(a). In attempting to do this, petitioner places heavy emphasis upon words contained in Rev. Rul. 76-28, 1976-1 C.B. 106. Rev. Rul. 76-28, 1976-1 C.B. at 107, states that it "provides rules with respect to the application of section 404(a)(6) * * * in those areas where the Service has determined that guidelines are necessary pending the issuance of regulations." (We note that as of the date of this opinion, some 20 years later, regulations have still not been forthcoming.) Rev. Rul. 76-28 holds that

> a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on schedule K of the partnership tax return for such year).

[1976-1 C.B. at 107.]

Revenue rulings are not ordinarily precedential in this Court. *Gordon v. Commissioner*, 88 T.C. 630, 635 (1987). We need not dwell on the question of the weight to be afforded Rev. Rul. 76-28 in this case, however (see *Estate of Lang v. Commissioner*, 64 T.C. 404, 407 (1975), affd. in part and revd. in part on an unrelated issue 613 F.2d 770 (9th Cir. 1980)), because we believe that in any case petitioner has failed to prove that the payments in question were treated in the same manner that the CBA Plans would treat a payment actually received on the last day of the current taxable year.

Section 413(b)(7) prescribes the method for determining the parameters of the deduction limitations in the case of CBA Plans. Section 413(b)(7) provides that each applicable section 404(a) limitation is to be determined as if all participants in the plan are employed by a single employer. The amount contributed by each employer under a CBA Plan will not exceed the maximum deduction limitation if the *anticipated* employee contributions for the plan year are no greater than the limitation. H. Rept. 93-807, *supra* at 101, 1974-3 C.B. (Supp.) at 336.

Under section 413(b)(7), the anticipated employer contributions for a plan year are to be determined in a manner consistent with the manner in which *actual* employer contributions are determined.

We would repeat at this juncture that although sections 404(a)(1)(A) and 413(b)(7) establish outside limits on the amount that may be deducted in a given taxable year, these sections do not determine the amount of the deduction. Nevertheless, we think sections 404(a)(1)(A) and 413(b)(7) establish the approach to be taken to determine the amount of the actual deduction for contributions to CBA Plans.

In a case such as this, where a number of employers are contributing to any given plan – and here 29 different CBA Plans with differing plan years are involved – the computation of any contributing employer's total contribution deduction for a taxable year is obviously a very complex operation. But it stands to reason that the *anticipated* contributions from each employer must be based upon a 12-month year, and the subsequent contributions, and the consequent deductions, in order to be consistent as required by section 413(b)(7) must likewise be based upon a 12-month year. A taxpayer-employer such as petitioner may not unilaterally expand its deduction limitation, and increase the amount of its deduction, simply by including contributions in amounts that are inconsistent with anticipated employer contributions.

Furthermore, petitioner has not shown that its deduction as enhanced by the post-yearend contribution falls within the plan limits stipulated by the parties and reflected in our findings of fact. (The parties stipulated

that actual contributions during the plan year as recorded on Forms 5500, Schedule B, filed by the Six Large Plan Administrators, fall within the deductible limits.) Petitioner merely argues that the plan's computation of anticipated employer contributions is not concerned with the amount of the employer's deduction. But section 413(b)(7) requires that the computation of anticipated employer contributions must be consistent with actual employer contributions, and we believe that if such consistency is achieved, as in this case, then the actual contributions – those based on hours worked in the taxable year – determine the amount of the deduction.

Sandra Turpen, the Plan Administrator for the Northern California Retail Clerks' Employer Benefit Fund, testified that the minimum funding standard for the fund is calculated on a calendar year basis, by actuaries who base their calculations upon data furnished by the Fund. The Fund bills each employer on the first of each month, indicating the contribution rate applicable to that employer, and the employer in turn provides the Fund with a list of employees and hours worked, calculates the per hour rate times the hours worked, and makes its monthly contribution accordingly. As stated earlier, payments are due on the 20th of the month, and are deemed delinquent if not received by the end of the month.

Petitioner's Current Taxable Year ended February 2, 1986. It seems obvious that, except for delinquent payments on account of a preceding month in the taxable year, the only grace period contribution in this case that would be treated by the Northern California Retail Clerks' Employer Benefit Fund in the same manner that the Plan would treat a payment actually received on

February 2, 1986, would be the payment for hours worked in January, 1986, and which was due February 20, 1986. All monthly payments thereafter would be treated by the Plan as being related to hours worked in a tax year subsequent to the Current Taxable Year.

Petitioner complains that the administrative procedures of the Northern California Retail Clerks' Employer Benefit Fund, as described by Sandra Turpen, are not necessarily representative of the procedures of any other plan, and may not therefore be relied upon as the basis for finding facts except as to the Plan for which Ms. Turpen was the administrator. We find this argument disingenuous. Petitioner and respondent stipulated Ms. Turpen's deposition as a joint exhibit in lieu of testimony by Ms. Turpen at trial, without any reservation as to its use, or inferences to be drawn from it, whatsoever. Petitioner's purpose in stipulating the deposition is not apparent, if the testimony is not stipulated for the purpose of exemplifying the administrative procedures of all of the CBA Plans involved in this case. If petitioner considers the administration of Ms. Turpen's plan to be atypical, petitioner was free to introduce evidence as to how the other plans were administered, which petitioner chose not to do. We therefore reject petitioner's complaint about scope of the testimony.

Petitioner argues that respondent's position is inconsistent not only with Rev. Rul. 76-28, 1976-1 C.B. 106, but also with the administrative position taken in Technical Advice Memorandum 8210014 (TAM) and in a series of private letter rulings. Respondent points out that section 6110(j)(3) prohibits using or citing a written determination as a precedent, unless regulations provide otherwise,

which is not the case here. See *Estate of Jalkut v. Commissioner*, 96 T.C. 675, 684 (1991). Nevertheless, since the TAM appears to be the wellspring of petitioner's enhanced deduction claim, we deem it necessary to discuss it.

The TAM purports to apply Rev. Rul. 76-28 as it relates to section 404(a)(6) grace period contributions in defined contributions plan cases. As previously noted, Rev. Rul. 76-28 contains several tests (including one insignificant alternative) for determining whether grace period contributions may be deemed to have been made on the last day of the preceding taxable year. One of the tests, easily met, is that the employer must claim the contribution as a deduction on its tax return for the preceding taxable year.

The second test is that the plan must treat the contributions in the same manner as payments actually received on the last day of the preceding taxable year. The TAM nullifies this, the only really significant requirement of Rev. Rul. 76-28, by holding that since there is no specific linkage between contributions and benefits in a defined benefit plan, the requirement that the plan treat the contributions in the same manner as it would a contribution actually received on the last day of the preceding taxable year, is "meaningless".

Having thus seemingly emasculated Rev. Rul. 76-28 as it might otherwise apply to a vast number of employee benefit plans if the TAM were applied across the board, the TAM concludes, however, by saying that "This ruling does not consider the actual amounts deductible for

the * * * [relevant] taxable year." Petitioner does not mention this pronouncement.

Rev. Rul. 76-28 provides that a grace period contribution is to be considered "on account of" (the words of section 404(a)(6)) the preceding taxable year if the contribution is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year. The TAM states that "A contribution generally does not have any effect on the actual benefits payable to an employee." Petitioner argues that all contributions to each CBA Plan in this case were commingled with all other employers' contributions in a single undifferentiated pool and used to pay plan benefits and expenses without distinction as to when or by whom any contribution was made. Thus, reasons petitioner, it follows that any grace period contribution is treated by the plan in the same manner as the plan would treat a "last day" contribution.

We are not convinced that the absence of a contribution-benefit linkage establishes "same treatment", nor that the same treatment standard created by Rev. Rul. 76-28 is the only standard by which to measure the requirement of section 404(a)(6) that grace period contributions be "on account of" the relevant taxable year. We are, convinced, however, that petitioner may not arbitrarily expand the deductible limit for any taxable year by the simple expedient of including, in the taxable year's deduction, contributions based entirely upon hours worked by the plans's participants in a subsequent year.

Petitioner argues that respondent cannot change her longstanding administrative practice and apply the change on a retroactive basis. Respondent replies that the five private letter rulings, and possibly the TAM, relied on by petitioner relate to single employer, not multi-employer pension plans. In the former case, the single employer has flexibility in deciding how much and when to contribute, since there are no contractual provisions requiring the single employer to contribute pursuant to a formula at regular intervals. Petitioner's contributions, on the other hand, are, by contract, mechanical and predictable. Whether the private letter rulings, plus the TAM and Rev. Rul. 76-28, rise to the level of "longstanding administrative practice" is, to say the least, problematical, but in any event, as the Supreme Court has stated in *Dixon v. United States*, 381 U.S. 68, 73 (1965), Congress, and not the Commissioner, prescribes the tax laws, so that if indeed Rev. Rul. 76-28 and its ruling letter progeny are inconsistent with the thrust of section 404(a)(6), they must give way to the statute. See also *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-843 (1984).

We have considered petitioner's remaining arguments, which are basically variations on a theme, and find them equally unpersuasive.

We hold that petitioner's grace period contributions, except those that relate to hours worked in January, 1986, are not on account of petitioner's taxable year ended February 2, 1986, as required by section 404(a)(6), and are therefore not deductible in that year.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AIRBORNE FREIGHT CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C95-301R ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND STRIKING PRETRIAL CONFERENCE (Filed Sep. 20, 1996)

THIS MATTER comes before the court on a motion by defendant United States of America ("the government") for reconsideration of this court's Order of November 7, 1995. Having reviewed the motion together with plaintiff's response, the court finds and rules as follows:

The government's motion is DENIED. The Tax Court decision on which the government relies is not binding on this court, nor does it include any persuasive legal analysis for the decision it reaches. *See Lucky Stores, Inc. v. Commissioner,* 107 T.C. 1 (1996).

Based on government counsel's statement to the scheduling clerk that there is no need for a trial in this case, the pretrial conference scheduled for Friday, September 27, 1996 is hereby canceled.

DATED at Seattle, Washington this 20th day of September, 1996.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT
JUDGE

APPENDIX F

Hon. Barbara Jacobs Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AIRBORNE FREIGHT CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C95-301R [/s/ BJR] ~~CLERK'S~~ ENTRY OF JUDGMENT (Filed Dec. 10, 1996)

Judgment is hereby entered as follows:

1. Against the United States, and in favor of Airborne Freight Corporation, on its claim for a refund of tax and assessed interest for the tax year 1989, in the amount of $1,596,962.54, plus interest from the date paid by Airborne until the date of this judgment at the rate provided by 26 U.S.C. § 6621(a)(1), and from the date of this judgment until the date paid by the United States to Airborne at the rate provided by 28 U.S.C. § 1961(c) and 26 U.S.C. § 6621(a)(1);

2. Against the United States, and in favor of Airborne Freight Corporation, on its claim for a refund of tax and assessed interest for the tax year 1990, in the amount of $313,452.77, plus interest from the date paid by Airborne until the date of this judgment at the rate provided

by 26 U.S.C. § 6621(a)(1), and from the date of this judgment until the date paid by the United States to Airborne at the rate provided by 28 U.S.C. § 1961(c) and 26 U.S.C. § 6621(a)(1);

3. Against the United States, and in favor of Airborne Freight Corporation, on its claim for an increase in Airborne's General Business Credit as provided in 26 U.S.C. § 38, from allowance of Investment Tax Credit as provided in 26 U.S.C. § 46, for the tax year 1989, in the amount of $115,788;

4. Against the United States, and in favor of Airborne Freight Corporation, on its claim for an increase in Airborne's General Business Credit as provided in 26 U.S.C. § 38, from allowance of Investment Tax Credit as provided in 26 U.S.C. § 46, for the tax year 1990, in the amount of $229,240.

DATED this 9th day of December, 1996.

/s/ Barbara Jacobs Rothstein
Hon. Barbara Jacobs Rothstein
United States District Judge

Approved as to form:

ROBERT J. BRANMAN
Trial Attorney, Tax Division
U.S. Department of Justice
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APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AIRBORNE FREIGHT CORPORATION, Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	CA No. 97-35129 DC No. CV-95-00301-BJR
AMERICAN TRUCKING ASSOCIATION, amicus; CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA GROCERS ASSOCIATION; CALIFORNIA RETAILERS ASSOCIATION; FOOD EMPLOYERS COUNCIL, INC.; FOOD MARKETING INSTITUTE; NATIONAL COORDINATING COUNCIL FOR MULTIEMPLOYER PLANS; OREGON GROCERY INDUSTRY ASSOCIATION; WASHINGTON RETAIL ASSOCIATION; Amici Curiae.	ORDER (Filed Nov. 12, 1998)

BEFORE: CANBY and REINHARDT, Circuit Judges, and RESTANI,[1] Judge, United States Court of International Trade

The appellee Airborne Freight Corporation's motion to defer action on the petition for rehearing with suggestion for rehearing en banc is DENIED.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Reinhardt voted to reject the suggestion for rehearing en banc, and Judges Canby and Restani have so recommended.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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[1] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

APPENDIX H

THE UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

26 U.S.C. § 7805 (1996)

SEC. 7805 RULES AND REGULATIONS

* * *

(b) Retroactivity of regulations. –

(1) In general. –

Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:

(A) The date on which such regulation is filed with the Federal Register.

(B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.

(C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

(2) Exception for promptly issued regulations. –

Paragraph (1) shall not apply to regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates.

(3) Prevention of abuse. –

The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse.

(4) Correction of procedural defect. –

The Secretary may provide that any regulation may apply retroactively to correct a procedural defect in the issuance of any prior regulation.

(5) Internal regulations. –

The limitation of paragraph (1) shall not apply to any regulation relating to internal Treasury Department policies, practices, or procedures.

(6) Congressional authorization. –

The limitation of paragraph (1) may be superseded by a legislative grant from Congress authorizing the Secretary to prescribe the effective date with respect to any regulation.

(7) Election to apply retroactively. –

The Secretary may provide for any taxpayer to elect to apply any regulation before the dates specified in paragraph (1).

(8) Application to rulings. –

The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

* * *

APPENDIX J

26 U.S.C. § 7430 (1998)

§ 7430. Awarding of costs and certain fees.

(a) In general. In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for –

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations. (1) Requirement that administrative remedies be exhausted. A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

(2) Only costs allocable to the United States. An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party.

(3) Costs denied where party prevailing protracts proceedings. No award for reasonable litigation and administrative costs may be made under subsection

(a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(4) Period for applying to IRS for administrative costs. An award may be made under subsection (a) by the Internal Revenue Service for reasonable administrative costs only if the prevailing party files an application with the Internal Revenue Service for such costs before the 91st day after the date on which the final decision of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party.

(c) Definitions [Caution: For provisions applicable to costs incurred on or before January 22, 1999, see note below relating to amendment made by Sec. 3101 of P.L. 105-206.]. For purposes of this section –

(1) Reasonable litigation costs. The term "reasonable litigation costs" includes –

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished –

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the

court proceeding, except that such fees shall not be in excess of $125 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise, justifies a higher rate.

In the case of any calendar year beginning after 1996, the dollar amount referred to in clause (iii) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting "calendar year 1995" for "calendar year 1992" in subparagraph (B) thereof. If any dollar amount after being increased under the preceding sentence is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

(2) Reasonable administrative costs. The term "reasonable administrative costs" means –

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B) except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(C) of the awarding of reasonable administrative costs is made by the Internal Revenue Service.

Such term shall only include costs incurred on or after whichever of the following is the earliest: (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; (ii) the date of the notice of deficiency, or

(iii) the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Office of Appeals is sent.

(3) **Attorneys Fees [Caution: For provisions applicable to services performed before January 22, 1999, see note below relating to amendment made by Sec. 3101 of P.L. 105-206.].** (A) In general. For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services. The court may award reasonable attorneys fees under subsection (a) in excess of the attorneys fees paid or incurred if such fees are less than the reasonable attorneys fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) **Prevailing party.** (A) In general. The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved) –

(i) which –

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Exception if United States establishes that its position was substantially justified. (i) General Rule. A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance. For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues. In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance. For purposes of clause (ii), the term "applicable published guidance" means –

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or –

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court.

(D) Special rules for applying net worth requirement. In applying the requirements of section 2412(d)(2)(B) of title 28, United States Code, for purposes of subparagraph (A) (ii) of this paragraph –

(i) the Net worth limitation in clause (i) of such section shall apply to –

(I) an estate but shall be determined as of the date of the decedent's death, and

(II) a trust but shall be determined as of the last day of the taxable year involved in the proceeding, and

(ii) individuals filing a joint return shall be treated as separate individuals for purposes of clause (i) of such section.

(E) Special rules where judgment less than taxpayer's offer. (I) In general. A party to a court proceeding meeting the requirements of subparagraph (A) (ii) shall be treated as the prevailing party if the liability of the taxpayer pursuant to the judgment in the proceeding (determined without regard to interest) is equal to or less than the liability of the taxpayer which would have been so determined if the United States had accepted a qualified offer of the party under subsection (g).

(ii) Exceptions. This subparagraph shall not apply to –

(I) any judgment issued pursuant to a settlement; or

(II) any proceeding in which the amount of tax liability is not in issue, including any declaratory judgment proceeding, any proceeding to enforce or quash any summons issued pursuant to this title, and any action to restrain disclosure under section 61.10(f).

(iii) Special rules. If this subparagraph applies to any court proceeding –

(I) the determination under clause (i) shall be made by reference to the last qualified offer made with respect to the tax liability at issue in the proceeding; and

(II) reasonable administrative and litigation costs shall only include costs incurred on and after the date of such offer.

(iv) Coordination. This subparagraph shall not apply to a party which is a prevailing party under any other provision of this paragraph.

(5) Administrative Proceedings. The term "administrative proceeding" means any procedure or other action before the Internal Revenue Service.

(6) Court proceedings. The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court).

(7) Position of United States. The term "position of the United States" means –

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of –

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

(d) Special rules for payment of costs. (1) Reasonable administrative costs. An award for reasonable administrative costs shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(2) Reasonable litigation costs. An award for reasonable litigation costs shall be payable in the case of the Tax Court in the same manner as such an award by a district court.

(e) Multiple actions. For purposes of this section, in the case of –

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court.

such actions or cases shall be treated as 1 court proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated.

(f) Right of appeal. (1) Court proceedings. An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs under subsection (a) in a court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision of judgment.

(2) Administrative proceedings. A decision granting or denying (in whole or in part) an award for reasonable administrative costs under subsection (a) by the Internal Revenue Service shall be subject to the filing of a petition for review with the Tax Court under rules similar to the rules under section 7463 (without regard to the amount in dispute). If the Secretary sends by certified or registered mail a notice of such decision to the petitioner, no proceeding in the Tax Court may be initiated under this paragraph unless such petition is filed before the 91st day after the date of such mailing.

(3) Appeal of Tax Court decision. An order of the Tax Court disposing of a petition under paragraph (2) shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(g) Qualified offer [Caution: This subsection applies to costs incurred after January 22, 1999, pursuant to Sect. 3101(g) of P.L. 105-206, which appears as a note to this section.]. For purposes of subsection (c)(4) –

(1) In general. The term "qualified offer" means a written offer which –

(A) is made by the taxpayer to the United States during the qualified offer period;

(B) specifies the offered amount of the taxpayer's liability (determined without regard to interest).

(C) is designated at the time it is made as a qualified offer for purposes of this section; and

(D) remains open during the period beginning on the date it is made and ending on the earliest of the date the offer is rejected, the date the trial begins, or the 90th day after the date the offer is made.

(2) Qualified offer period. For purposes of this subsection, the term "qualified offer period" means the period –

(A) beginning on the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent, and

(B) ending on the date which is 30 days before the date the case is first set for trial.

APPENDIX K

26 U.S.C. § 404(a)(6) (1986)

SEC. 404. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN.

(a) GENERAL RULE. – If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under this chapter; but if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

* * *

(6) TIME WHEN CONTRIBUTIONS DEEMED MADE. – For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

APPENDIX L

STATEMENT OF PROCEDURAL RULES

* * *

Subpart F – Rules, Regulations, and Forms (26 C.F.R., Part 601)

* * *

§ 601.601. Rules & Regulations. –

* * *

(d) *Publication of rules and regulations* – (1) *General.* All internal revenue regulations and Treasury decisions are published in the FEDERAL REGISTER and in the Code of Federal Regulations. See Paragraph (a) of § 601.702. The Treasury decisions are also published in the weekly Internal Revenue Bulletin and the semi-annual Cumulative Bulletin. The Internal Revenue Bulletin is the authoritative instrument of the Commissioner for the announcement of official rulings, decisions, opinions, and procedures, and for the publication of Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items pertaining to internal revenue matters. It is the policy of the Internal Revenue Service to publish in the Bulletin all substantive and procedural rulings of importance or general interest, the publication of which is considered necessary to promote a uniform application of the laws administered by the Service. Procedures set forth in Revenue Procedures published in the Bulletin which are of general applicability and which have continuing force and effect are incorporated as amendments to the Statement of procedural Rules. It is also the policy to publish in the Bulletin all rulings which

revoke, modify, amend, or affect any published ruling. Rules relating solely to matters of internal practices and procedures are not published; however, statements of internal practices and procedures affecting rights or duties of taxpayers, or industry regulation, which appear in internal management documents, are published in the Bulletin. No unpublished ruling or decision will be relied on, used, or cited by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.

(2) *Objectives and standards for publication of Revenue Rulings and Revenue Procedures in the Internal Revenue Bulletin.* – (i)(*a*) A "Revenue Ruling" is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

(*b*) A "Revenue Procedure" is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.

(ii)(*a*) The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for the publication of official rulings and procedures of the Internal Revenue Service, including all rulings and statements of procedure which supersede, revoke, modify, amend, or affect any previously published ruling or procedure. The Service also announces in the Bulletin the

Commissioner's acquiescences and non-acquiescences in decisions of the United States Tax Court (other than decisions in memorandum opinions), and publishes Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items considered to be of general interest. The Assistant Commissioner (Technical) administers the Bulletin program.

(*b*) The Bulletin is published weekly. In order to provide a permanent reference source, the contents of the Bulletin are consolidated semiannually into an indexed Cumulative Bulletin. The Bulletin Index-Digest System provides a research and reference guide to matters appearing in the Cumulative Bulletins. These materials are sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(iii) The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers. Therefore, issues and answers involving substantive tax law under the jurisdiction of the Internal Revenue Service will be published in the Internal Revenue Bulletin, except those involving:

(*a*) Issues answered by statute, treaty, or regulations;

(*b*) Issues answered by rulings, opinions, or court decisions previously published in the Bulletin;

(*c*) Issues that are of insufficient importance or interest to warrant publication;

(*d*) Determinations of fact rather than interpretations of law;

(*e*) Informers and informers' rewards; or

(*f*) Disclosure of secret formulas, processes, business practices, and similar information.

Procedures affecting taxpayers' rights or duties that relate to matters under the jurisdiction of the Service will be published in the Bulletin.

(iv) [Reserved].

(v)(*a*) Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of Revenue Rulings. The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling. Revenue Rulings arise from various sources including rulings to taxpayers, technical advice to district offices, studies undertaken by the Office of the Assistant Commissioner (Technical), court decisions, suggestions from tax practitioner groups, publications, etc.

(*b*) It will be the practice of the Service to publish as much of the ruling or communication as is necessary for an understanding of the position stated. However, in order to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as 18 U.S.C. 1905 and 26 U.S.C. 7213, dealing with disclosure of

information obtained from members of the public, identifying details, including the names and addresses of persons involved, and information of a confidential nature are deleted from the ruling.

(*c*) Revenue Rulings, other than those relating to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, apply retroactively unless the Revenue Ruling includes a specific statement indicating, under the authority of section 7805(b) of the Internal Revenue Code of 1954, the extent to which it is to be applied without retroactive effect. Where Revenue Rulings revoke or modify rulings previously published in the Bulletin the authority of section7805(b) of the code ordinarily is invoked to provide that the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers. Section 7805(b) of the Code provides that the Secretary of the Treasury or his delegate may prescribe the extent to which any ruling is to be applied without retroactive effect. The exercise of this authority requires an affirmative action. For the effect of Revenue Rulings on determination letters and opinion letters issued with respect to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, see paragraph (o) of § 601.201.

(*d*) Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision will be relied

on, used, or cited, by an officer or employee of the Service as a precedent in the disposition of other cases.

(*e*) Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.

(*f*) Comments and suggestions from taxpayers or taxpayer groups on Revenue Rulings being prepared for publication in the Bulletin may be solicited, if justified by special circumstances. Conferences on Revenue Rulings being prepared for publication will not be granted except where the Service determines that such action is justified by special circumstances.

(vi) Statements of procedures which affect the rights or duties of taxpayers or other members of the public under the Code and related statutes will be published in the Bulletin in the form of Revenue Procedures. Revenue Procedures usually reflect the contents of internal management documents, but, where appropriate, they are also published to announce practices and procedures for guidance of the public. It is Service practice to publish

as much of the internal management document or communication as is necessary for an understanding of the procedure. Revenue Procedures may also be based on internal management documents which should be a matter of public knowledge even though not necessarily affecting the rights or duties of the public. When publication of the substance of a Revenue Procedure in the Federal Register is required pursuant to 5 U.S.C. 552, it will usually be accomplished by an amendment of the Statement of Procedural Rules (26 CFR Part 601).

(vii)(*a*) The Assistant Commissioner (Technical) is responsible for administering the system for the publication of Revenue Rulings and Revenue Procedures in the Bulletin, including the standards for style and format.

(*b*) In accordance with the standards set forth in subdivision (iv) of this subparagraph, each Assistant Commissioner is responsible for the preparation and appropriate referral for publication of Revenue Rulings reflecting interpretations of substantive tax law made by his office and communicated in writing to taxpayers or field offices. In this connection, the Chief Counsel is responsible for the referral to the appropriate Assistant Commissioner, for consideration for publication as Revenue Rulings, of interpretations of substantive tax law made by his Office.

(*c*) In accordance with the standards set forth in subdivision (iv) of this subparagraph, each Assistant Commissioner and the Chief counsel is responsible for determining whether procedures established by any

office under his jurisdiction should be published as Revenue Procedures and for the initiation, content, and appropriate referral for publication of such Revenue Procedures.

* * *

APPENDIX M

Rev. Rul. 76-28[1]

Section 404 – Deduction for Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred Payment Plan

1976-1 C.B. 106; 1976 IRB LEXIS 598; REV. RUL. 76-28

January, 1976

Employer's contribution after close of taxable year. An employer's payment to a qualified retirement plan after the close of the employer's taxable year to which section 404(a)(6) of the Code, as amended, applies shall be considered to be on account of the preceding taxable year (providing the plan was in existence in such year) if the plan treats the payment as it would treat a payment actually received on the last day of the employer's preceding taxable year, and the employer designates the payment in writing to the plan administrator or trustee as a payment on account of its preceding taxable year or deducts the payment on its tax return on or before the due date of its return for such year, including extensions thereof. Employers whose returns are due on or before March 31, 1976, may, on or before September 30, 1976, designate a payment or file an amended return claiming a payment in this manner and, once a payment has been so designated or claimed on a return, the action shall be irrevocable.

This Revenue ruling provides rules with respect to the application of section 404(a)(6) of the Code, as amended by the Employee Retirement Income Security

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[1] Also released as TIR-1431, dated Jan. 5, 1976.

Act of 1974 ("ERISA") (Pub. Law No. 93-406, 88 Stat. 829), *1974-3 C.B. 148*, in those areas where the Service has determined that guidelines are necessary pending the issuance of regulations.

Section 404(a)(6) of the Code, as amended by ERISA, provides that for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made payment of a contribution to a qualified retirement plan on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the income tax return for such taxable year (including extensions thereof).

Section 404(a)(6), as amended by ERISA, is applicable to contributions on account of taxable years of the employer which end with or within plan years which: (a) in the case of a plan which was not in existence on January 1, 1974, begin after September 2, 1974; (b) in the case of a plan which was in existence on January 1, 1974, and with respect to which the elections prescribed by sections 1017(d) and 1017(i) of ERISA have not been made, begin after December 31, 1975; (c) in the case of a plan with respect to which the election provided in section 1017(d) of ERISA (see § 11.410(a)-2(d) of the Temporary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) has been made, are subject to such election, or are subsequent thereto; or (d) in the case of a plan with respect to which the election provided in section 1017(i) of ERISA (as amended by section 402 of the Tax Reduction Act of 1975) [Pub. L. 94-12, *1975-1 C.B. 545*] has been made, are subject to such election, or are subsequent thereto.

Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on schedule K of the partnership tax return for such year).

For purposes of the above requirements, the following rules shall apply.

First, a payment may be designated as a payment on account of the preceding taxable year in the manner provided above at any time on or before the due date of the employer's tax return for such year (including extensions thereof).

Second, employers whose tax returns are due (including extensions thereof) on or before March 31, 1976, may, at any time on or before September 30, 1976, either designate such payment in the manner provided above or file

an amended return claiming such payment in the manner provided above.

Third, once a payment has been designated or claimed on a return in the manner provided above as being on account of a preceding taxable year, the choice made shall be irrevocable and an employer may not retract or change such designation or claim.

The rules contained in this Revenue Ruling do not change the requirement that a plan must be in existence as of the last day of the employer's taxable year with respect to which a contribution is made. Furthermore, the rules contained in this Revenue Ruling implement the amendment made to section 404(a)(6) of the Code by ERISA, and, therefore, are inapplicable to taxable years of an employer not affected by that amendment.

APPENDIX N

Rev. Proc. 89-14

Rev. Proc. 89-14

SECTION 1. PURPOSE

This revenue procedure supercedes Rev. Proc. 86-15, 1986-1C.B. 544, and makes the changes described in section 2 below. The revenue procedure restates the objectives of, and sets forth the standards for, the publication of revenue rulings and revenue procedures in the Internal Revenue Bulletin.

SECTION 2. CHANGES

Section 7.01(5) of Rev. Proc. 86-15 provides that because each revenue ruling represents the conclusion of the Service as to the application of the law to the entire statement of facts involved, taxpayer, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. This caution, which now appears in section 7.01(6) of this revenue procedure, has been clarified. It now explicitly warns that, if from the facts, legal analysis, or other discussion it is clear that the federal tax law conclusion of the revenue ruling or revenue procedure is predicated upon a certain provision or interpretation of law other than federal tax law, then those seeking to rely on that conclusion must check to see whether such relevant nontax law has changed materially from that used in the revenue ruling or revenue procedure.

Section 7.01(7) of the revenue procedure is revised to add a statement which encourages all interested parties to submit suggestions of generic issues that would be appropriately addressed in revenue rulings or revenue procedures.

Section 8101 is revised to reflect the fact that the Assistant Commissioner (Taxpayer Service and Returns Processing) is now responsible for publishing the Internal Revenue Bulletin.

SEC. 3. DEFINITIONS

01 A "revenue ruling" is an official interpretation by the Service of the internal revenue laws and related statutes, treaties, and regulations, that has been published in the Bulletin. Revenue rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Service officials, and others concerned.

02 A "revenue procedure" is an official statement of a procedure published in the Bulletin that either affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code and related statutes, treaties, and regulations or although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.

SEC. 4. BACKGROUND

01 The Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for the publication

of official rulings and procedures of the Service, including all rulings and statements of procedure that supercede, revoke, modify, amend, or affect any previously published ruling or procedure. The Service also announces in the Bulletin the Commissioner's acquiescence or nonacquiescence in decisions of the United States Tax court (other than decisions in memorandum opinions), and publishes Treasury Decisions, Executive Orders, tax conventions, legislation, court decisions, and other items considered to be of general interest.

02 The Bulletin is published weekly. In order to provide a permanent reference source, the contents of the Bulletin are consolidated semiannually into an indexed Cumulative Bulletin. These materials are sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325.

SEC. 5. OBJECTIVES

The purpose of publication of revenue rulings and revenue procedures in the Bulletin is to promote uniform application of the tax laws by Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, and regulations, and statements of Service procedures affecting the rights and duties of taxpayers.

SEC. 6 PUBLICATION STANDARDS

01 It is the policy of the Service to publish in the Bulletin issues and answers involving substantive tax laws under the jurisdiction of the Service, except those involving –

(1) Issues answered by statute, treaties, or regulations;

(2) Issues answered by rulings, opinions, or court decisions previously published in the Bulletin;

(3) Issues that are of insufficient importance or interest to warrant publication;

(4) Determinations of fact rather than interpretations of law;

(5) Informers and informers' rewards; and

(6) Disclosure of secret formulas, processes, business practices, and similar information.

02 It is the policy of the Service to publish in the Bulletin procedures affecting taxpayers' rights or duties that relate to matters under the jurisdiction of the Service.

SEC. 7. FORM AND EFFECT OF PUBLICATION

01 Revenue Rulings.

(1) Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of revenue rulings. The conclusions expressed in a revenue ruling will be directly responsive to, and limited in scope by, the pivotal facts stated in the revenue ruling. Revenue rulings arise from various

sources, including rulings to taxpayers, technical advice to district offices, court decisions, suggestions from tax practitioner groups, publications, etc.

(2) If the revenue ruling arises from the circumstances of a particular taxpayer, the Service published as much as is necessary for an understanding of the position stated. However, identifying details, including the names and addresses of persons involved, and information of a confidential nature are not included, to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as 18 U.S.C. section 1905 and 26 U.S.C. sections 6103 and 7213, dealing with disclosure of information obtained from members of the public.

(3) A revenue ruling, other than one relating to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, applies retroactively, unless it includes a specific statement indicating, under the authority of section 7805(b) of the Code, the extent to which it is to be applied without retroactive effect. When revenue rulings revoke or modify rulings previously published in the Bulletin, the authority of section 7805(b) ordinarily is invoked to provide that the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers. Section 7805(b) provides that the Secretary of the Treasury may prescribe the extent to which any ruling is to be applied without retroactive effect. That authority has been delegated to the Commissioner and has been delegated to the Associate Chief Counsel (Technical), the Associate Chief Counsel (International), and the Assistant Commissioner (Employee Plans and Exempt Organizations) and to each of their deputies. The exercise of this

authority requires an affirmative action. For the effect of revenue rulings on determination letters and opinion letters issued with respect to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, see section 13 of Rev. Proc. 80-30, 1980-1 C.B. 685.

(4) Revenue rulings published in the Bulletin do not have the force and effect of Treasury Department regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No published ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases.

(5) Taxpayer generally may rely upon revenue rulings and revenue procedures published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling or revenue procedure to the facts of their particular cases. However, taxpayer, Service personnel, and others concerned are also cautioned to determine whether a revenue ruling or revenue procedure on which they seek to rely has been revoked, modified, declared obsolete, distinguished, clarified, or otherwise affected by subsequent legislation, treaties, regulations, revenue rulings, revenue procedures or court decisions.

(6) Each revenue ruling represents the conclusion of the Service as to the application of the law to the entire statement of facts involved. Therefore, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the

facts and circumstances are substantially the same. For example, occasionally, from the facts, legal analysis, or other discussion it is clear that the federal tax law conclusion of the revenue ruling or revenue procedure is predicated upon a certain provision or interpretation of law other than federal tax law. If so, taxpayers, Service personnel, and others concerned are also cautioned to determine whether such relevant nontax law has changed materially from that used in the revenue ruling or revenue procedure on which they seek to rely. In some cases, if the conclusion of a revenue ruling or revenue procedure is so predicated on such nontax law, the ruling or procedure may caution taxpayers by referring to this paragraph of this revenue procedure. Any absence, however, of such a caution does not prevent the principles stated here from applying to that revenue ruling or revenue procedure.

(7) All interested parties, including teachers, professional associations, and trade or business groups are encouraged to submit suggestions of generic issues that would be appropriately addressed in revenue rulings or revenue procedures. Also, comments and suggestions from taxpayer, taxpayer groups, or other interested parties, on revenue rulings or revenue procedures being prepared for publication in the Bulletin may be solicited if justified by special circumstances. Conferences on revenue rulings or revenue procedures being prepared for publication will not be granted except when the Service determines that such action is justified by special circumstances.

02 Revenue Procedures. When revenue procedures reflect the contents of internal management document, it

is Service practice to publish as much of the internal management document as is necessary for an understanding of the procedure. When publication of the substance of a revenue procedure in the Federal Register is required pursuant to 5 U.S.C. section 552, it will usually be accomplished by an amendment of the Statement of Procedural Rules. (26 C.F.R. Part 601).

SEC. 8. RESPONSIBILITIES

01 The Chief Counsel is responsible for administering the Service's revenue ruling and revenue procedure publication program including the standards for style and format revenue rulings and revenue procedures. The Assistant Commissioner (Taxpayer Service and Returns Processing) is responsible for publishing the Internal Revenue Bulletin weekly and for consolidating the contents of the Bulletin semiannually into an indexed Cumulative Bulletin.

02 In accordance with the standards set forth in section 6 of this revenue procedure, the Associate Chief Counsel (Technical), the Associate Chief Counsel (International), and the Assistant Commissioner (Employee Plans and Exempt Organizations) are responsible for the preparation and appropriate referral for publication of revenue rulings reflecting interpretations of substantive tax law made by their respective offices.

03 In accordance with the standards set forth in section 6 of this revenue procedure, all Assistant Commissioners and the Chief Counsel are responsible for the determination of whether procedures established by any office under their jurisdiction should be published as

revenue procedures and for the initiation, content, and appropriate referral for publication of such revenue procedures.

SEC. 9. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 86-15 is superseded.

APPENDIX O

INTERNAL REVENUE SERVICE
MANUAL
11/2/81

SUBSECTION-2:
424(14).3 Application of Private Letter Rulings and Memorandums, Etc.

* * *

(3) Existing files of private letter rulings and memorandums (including Confidential Unpublished Rulings, Advisory Memorandums, and General Counsel Memorandums) shall not be used as precedents in the disposition of other cases but may be used as a guide with other research material in formulating a district office position on an issue. Whenever a district office finds that a C.U.R., A.M., or G.C.M. digest represents the sole precedent or guide for determining the disposition of an issue and cannot to its own satisfaction also find justification in the Code, regulations, or published rulings to support the indicated position, technical advice should be requested from the National Office. (See IRM 4550.) Technical advice should also be requested in such cases when a taxpayer or his/her representative takes the position that the basis for the proposed action is not supported by statute, regulations, or published positions of the Service. If it is believed that the position of the Service should be published, the request for technical advice will contain a statement to that effect.

APPENDIX P

LTR8210014

Issue

Whether those amounts which were contributed to certain union negotiated plans by * * * and its subsidiaries during 1978, but prior to the date (with extensions) the 1977 tax return had to be filed, may be considered, in accordance with section 404(a)(6) of the Internal Revenue Code, to be "on account" of the 1977 year.

Facts

Contributions are made by * * * and its subsidiaries to several union negotiated defined benefit pension plans. The employer's taxable year is the calendar year. For years prior to 1977, the employer contributed and deducted for each year, the contribution actually made to the plans between January 1 and December 31 of such year. (There may have been some minor year-end adjustments because of hours worked near the end of a year where some contributions were not remitted until after the close of such year.)

For the year ended December 31, 1977, the employer deducted, under section 404 of the Code, not only the contributions made during the 1977 calendar year, but also amounts that were contributed to the plans during the period January 1, 1978 through September 15, 1978. September 15, 1978, is the due date (including extensions) for filing the employer's tax return for 1977.

Applicable Law

Section 404(a)(6) of the Internal Revenue Code provides that a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions).

Revenue Ruling 76-28, 1976 – 1 C.B. 107, provides that a payment made after the close of an employer's taxable year, as provided by section 404(a)(6), shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the late day of such preceding taxable year of the employer and (b) either of the following conditions is satisfied:

> (1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
>
> (2) The employer claims such payment as a deduction on its tax return for such preceding taxable year.

Rationale

For a contribution to be considered to be on account of a preceding taxable year, Revenue Ruling 76-28 provides that two requirements must be met.

In the case in question, the employer has claimed the payments made from January 1, 1978 through September

15, 1978, as a deduction on its tax return for 1977. Thus, one of the requirements has been met.

In defined benefit plans, the requirement that the plan treat the payments in the same manner as payments actually received on the last day of the preceding taxable year, is usually meaningless. A contribution generally does not have any effect on the actual benefits payable to an employee. Thus, for the plans involved in this case, benefits were not affected by the treatment by the plan of the contributions made after the close of the year. Consequently, based on the foregoing, the requirements of Revenue Ruling 76-28 have been met and those amounts contributed from January 1, 1978, through September 15, 1978, may be deemed to have been made on the last day of the preceding taxable year (i.e., December 31, 1977).

This ruling does not consider the actual amounts deductible for the 1977 taxable year.

Conclusion

Those amounts contributed to certain union negotiated plans by * * * and its subsidiaries during 1978, but prior to the date (with extensions) the 1977 tax return had to be filed, may be considered to be on account of the 1977 tax year.

APPENDIX Q

LTR 8543002

April 30, 1985
Key District Director: * * *
Key District Office: * * *
Taxpayer's Name: * * *
Taxpayer's Address: * * *
Taxpayer's EIN: * * *
Years Involved: * * *
Date of Conference: * * *

Issue:

Whether contributions that are made to a pension plan after the end of a company's taxable year but before the due date for filing federal income tax return, including extensions, may be deductible for that prior taxable year.

Facts:

The taxpayer is a corporation that files its federal income tax returns on a calendar year basis. The taxpayer maintains a defined benefit pension plan whose plan year is the calendar year. A payment to fund benefits is made by the taxpayer each month based on total monthly salary.

Through 1976, the taxpayer deducted as a pension expense for each taxable year, only those amounts contributed during the calendar, taxable year. In 1977, the taxpayer deducted as a pension expense not only those amounts contributed to the plan during taxable year 1977, but, in addition, those amounts contributed monthly from January 1978 through August 1978.

For taxable year 1978, the taxpayer deducted as a pension expense those amounts contributed to the plan from September 1978 through December 1978 and, additionally, those amounts contributed to the plan from January 1979 through August 1979. For taxable years 1979 through 1981, respectively, the taxpayer contained to deduct as a pension expense those amounts contributed to the plan during the period September through December of that particular taxable year and contributed to the plan during January through August of the succeeding calendar year.

The taxpayer's income tax returns from 1977 through 1981 were filed timely – prior to September 15th of each year – after the taxpayer had filed for an automatic extension of time within which to file its returns.

Law and Rationale:

Section 404(a)(1)(A) of the Internal Revenue Code allows a deduction for contributions paid into a pension trust, subject to certain limitations, in the taxable year when paid, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 501(a).

Section 404(a)(6) of the Code provides that, for purposes of the deductible limits for pension plans set forth in section 404(a)(1), (2) and (3), a taxpayer will be deemed to have made payment of a contribution to a qualified pension plan on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

Section 1.404(a) – 14(c) of the Income Tax Regulations sets forth the rules for determining the deductible limit under section 404(a)(1)(A) of the Code for defined benefit plans. This section provides that, although the deductible limit applies for an employer's taxable year, the deductible limit is determined on the basis of a plan year. If the employer's year does not coincide with the plan year, the deductible limit under section 404(a)(1)(A)(i), (ii) or (iii), for a given taxable year of the employer is one of the following alternatives:

(1) The deductible limit determined for the plan year commencing within the taxable year;

(2) The deductible limit determined for the plan year ending within the taxable year; or

(3) A weighted average of alternatives (1) and (2). Such an average may be based, for example, upon the number of months of each plan year falling within the taxable year.

The employer must use the same alternative for each taxable year unless consent to change is obtained from the Commissioner under section 446(e).

Rev. Rul. 76-28, 1976 – 1 C.B. 107, provides guidelines for the application of Code section 404(a)(6) and states, in part, as follows:

Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of

the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year.

Thus, Rev. Rul. 76-28 allows a taxpayer to treat a payment to its pension plan in a succeeding taxable year to be considered as "on account of" the preceding taxable year as provided in Code section 404(a)(6) if the conditions specified in the revenue ruling are met. However, the principles contained in Rev. Rul. 76-28 regarding the application of section 404(a)(6) are related only to the timing of contributions for deduction purposes and do not affect the computation of the plan's deductible limit under section 404(a).

Conclusion:

Here, the taxable years in question are 1980 and 1981. Because the contributions made in 1981 for taxable year 1980 and in 1982 for taxable year 1981 were made prior to the extended due date for filing the respective year's income tax returns, the taxpayer is entitled to claim a deduction for those succeeding year contributions on the prior year's tax returns. These deductions may, of course,

be taken only to the extent they do not exceed the maximum deductible limits of section 404 for taxable years 1980 and 1981, respectively.

Moreover, because there is no indication that there has been a change in the alternative as described in section 1.404(a) – 14(c) of the regulations, the requirements of section 446(e) of the Code, pertaining to change of accounting method, are not applicable.

APPENDIX R

LTR 8714008

Date: December 17, 1986

Taxpayer's Name: * * *
Taxpayer's Address: * * *
Taxpayer's EIN: * * *
Years Involved: * * *
Date of Conference: * * *

ISSUE:

Whether contributions paid after the close of the taxable year ending January 29, 1982, but before the filing of the applicable corporate tax return, are deductible on that return, when this taxable year is the first taxable year for which such deduction is claimed, and when such amounts are not attributable directly to unfunded past service liability incurred in that taxable year.

FACTS:

(Employer) makes monthly contributions to the * * * (the Fund) on behalf of its covered employees. For the taxable year ending January 29, 1982, the Employer claimed a deduction for contributions paid after the close of that taxable year through approximately the extended tax return filing date of October 15, 1982. This was the first time the Employer claimed such a deduction for contributions paid after the close of the taxable year. In the taxable year ending January 28, 1983, contributions paid from the filing date of the fiscal 1982 corporate tax return through the extended filing date of the fiscal 1983 return were taken as a deduction. Deductions for contributions

in subsequent years have been claimed in the same filing-date to filing-date manner.

LAW:

Under section 404(a)(6) of the Internal Revenue Code, a contribution made after the close of the taxable year, but prior to the time the appropriate return is filed, will be deemed to have been made on the last day of the preceding taxable year if it is made on account of that previous taxable year. Revenue Ruling 76-28, 1976-1 C.B. 107, states that a contribution is considered made on account of a taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following is satisfied:

> (1) the employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
>
> (2) the employer claims such payment as a deduction on his tax return for such preceding taxable year.

With respect to defined benefit plans, requirement (a) above is usually meaningless because a contribution to a defined benefit plan generally has no effect on the actual benefit payable to an employee.

Section 1.404-14(c) of the Income Tax Regulations provides alternative accounting methods for determining the limit on the deduction that a taxpayer may claim for a taxable year. A change from one method to another

method constitutes a change in accounting methods for tax purposes. Section 404(a)(6) does not effect the accounting method used to calculate this limit. Instead, section 404(a)(6) provides a statutory time frame allowing a taxpayer to deduct certain amounts that are paid within that time frame and that fall within the limits determined under the accounting methods of section 1.404-14(c) of the regulations. Section 404(a)(6) of the Code, therefore, does not conflict with the accounting methods described in section 1.404-14(c) of the regulations for purposes of determining whether amounts paid after the close of the taxable year, but prior to the extended due date for filing this taxpayer's corporate tax return, are deductible on that return.

In general, section 404(a)(1)(A) of the Code limits the dollar amount of a taxpayer's deduction for contributions to a pension trust to the normal cost for the year plus an amount necessary to amortize certain credits in equal payments over 10 years. Nothing in the Code or the regulations requires contributions made after the close of the taxable year to be attributable to unfunded past service liability incurred in the previous taxable year in order to be deductible pursuant to section 404(a)(6). Instead, the limitation of section 404(a)(1)(A) is a fixed dollar amount that the taxpayer's deduction for the taxable year, including deductions pursuant to section 404(a)(6) for contributions made after the close of the taxable year, must not exceed. In addition, the principles of Rev. Rul. 76-28, regarding the application of section 404(a)(6), are related only to the timing of contributions for deduction purposes and do not affect the computation

of the plan's deductible limit under section 404(a). Therefore, such a deduction may be claimed without regard to whether such amounts are attributable to unfunded past service liability incurred in the previous taxable year.

RATIONALE:

In this case, the Employer, for the first time, claimed a deduction for contributions made after the close of the taxable year, but prior to the date the return was filed. Section 404(a)(6) of the Code provides statutory authority for this deduction. Since the deduction was claimed on the corporate tax return for the applicable taxable year, the contributions are deemed made on account of that year pursuant to the requirements of Rev. Rul. 76-28. This deduction does not constitute a change in the Employer's accounting method in violation of section 1.404-14(c) of the regulations. Such amounts may be deducted without regard to whether they are attributable to unfunded past service liability incurred during the prior taxable year. The total amount that may be deducted, however, is limited by the dollar amount determined under section 404(a)(1)(A) of the Code.

CONCLUSION

Contributions paid by the Employer after the close of the taxable year ending January 29, 1982, but before the filing of the applicable corporate tax return for that year, are deductible on that return.

Supreme Court, U.S.
FILED
APR 13 1999
CLERK

No. 98-1287

In the Supreme Court of the United States

OCTOBER TERM, 1998

AIRBORNE FREIGHT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

-ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
Counsel of Record
LORETTA C. ARGRETT
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QUESTION PRESENTED

Whether contributions to multiemployer defined benefit pension plans made by petitioner after the close of its taxable year were deductible in that year under Section 404(a)(6) of the Internal Revenue Code, 26 U.S.C. 404(a)(6).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	7

TABLE OF AUTHORITIES

Cases:

American Stores Co. v. *Commissioner*, 108 T.C. 178 (1997), aff'd, No. 97-9025, 1999 WL 122996 (10th Cir. Mar. 9, 1999) 7

Lucky Stores, Inc. v. *Commissioner*, 153 F.3d 964 (9th Cir. 1998), petition for cert. pending, No. 98-1279 ..... 5, 7

Statutes:

Internal Revenue Code (26 U.S.C.):

§ 404 7
§ 404(a) 6
§ 404(a)(1) 3, 4
§ 404(a)(6) 3, 4, 5, 6
§ 413(b)(7) 4
§ 414(f)(1) 2

Miscellaneous:

H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1 (1980) 2
Rev. Rul. 76-28, 1976-1 C.B. 106 ..... 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1287

AIRBORNE FREIGHT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 153 F.3d 967. The opinion of the district court (Pet. App. 22-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1998. The petition for rehearing was denied on November 12, 1998 (Pet. App. 57-58). The petition for a writ of certiorari was filed on February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to collective bargaining agreements with various labor unions, petitioner was required to make monthly contributions to several multiemployer, defined-benefit pension plans on behalf of certain of its unionized employees (Pet. App. 3).[1] The amount of monthly contributions required under the collective bargaining agreements was based on a prescribed rate per hour (or unit-of-service) of work performed, multiplied by the number of hours (or units-of-service) of work performed by each covered employee during that month (*id.* at 3, 22-23).[2] For example, under the collective bargaining agreement with the Teamsters union—a plan to which approximately 2,500 other employers also made contributions (D.R. 35, Exh. B at 6)—petitioner was required to make contributions at the rate of $1.94 for each hour worked up to a maximum of 173 hours per month per employee (D.R. 35, Exh. B at 12-14 and attached Exhs. 2-3).[3] At the end of each

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[1] A "multiemployer" pension plan is a pension plan "to which more than one employer is required to contribute" that is "maintained pursuant to one or more collective bargaining agreements." 26 U.S.C. 414(f)(1).

[2] Under multi-employer pension plans maintained pursuant to collective bargaining agreements, the parties "normally agree to contribute at rates specified in such agreement(s) for hours worked by employees, units of production * * * , or a percentage of compensation." H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 53 (1980).

[3] Dianne Fessler, petitioner's Controller of Tax Accounting (D.R. 35, Exh. A at 4-5), testified that she was not aware of any significant differences between the pension plan established under the collective bargaining agreement with the Teamsters union and the other multi-employer plans in issue in this case (D.R. 35, Exh. A at 14).

month, the administrative manager of the trust sent petitioner a pre-printed payment form setting forth a listing of employees that had been reported on the prior month's statement, and the corresponding hourly contribution rate (D.R. 35, Exh. B at 10-11, 15). Petitioner filled in the number of hours worked by each covered employee, added any new employees to the list, and remitted the amount so determined by the 10th day of the month following the month in which the covered services had been performed (D.R. 35, Exh. A at 20; D.R. 35, Exh. B at 15-16 and attached Exh. 1, at 6).

Because contributions to the plan were based on the number of hours worked, and the number of hours worked could not be determined in advance, the trust did not accept contributions based on services to be performed in future months (D.R. 35, Exh. B at 23). The administrator of the trust was not aware of any instance in which a taxpayer made a monthly contribution to the trust that exceeded the contribution required based on the units of service performed during the preceding month and the applicable contribution rate (D.R. 35, Exh. B at 24). On the actuarial reports filed by the trust with the Internal Revenue Service for plan years 1989 and 1990, the trusts reported only contributions with respect to hours worked during 1989 and 1990, respectively (D.R. 35, Exh. B at 30-31 and attached Exh. 4; D.R. 35, Exh. A at attached Exh. 2, at 2).

b. Under Section 404(a)(1) of the Internal Revenue Code, a contribution to a qualified pension plan is ordinarily deductible only in the taxable year in which the contribution is actually paid to the plan trust. As a limited exception to this general rule, Section 404(a)(6) permits a deduction for contributions made *after* the close of the taxable year, but *before* the date that the

taxpayer's tax return for the year is due (including extensions), *if* the contributions are made "on account of" the previous taxable year. 26 U.S.C. 404(a)(6). In Rev. Rul. 76-28, 1976-1 C.B. 106, the Internal Revenue Service ruled that a payment may be considered to be "on account of" the preceding taxable year if it "is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer."

Section 404(a)(1) also provides rules governing the maximum amount of deductible contributions to qualified plans. In the case of a collectively bargained pension plan, the deduction limit of Section 404(a)(1) is determined "as if all participants in the plan were employed by a single employer." 26 U.S.C. 413(b)(7). For such plans, contributions by employers are not considered to exceed such limitation if "anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation." *Ibid.*

Prior to the end of its tax year on December 31, 1989, petitioner computed its deduction for contributions to the multiemployer plans by adding the 12 contractually required monthly contributions made in respect of hours of covered services worked during the year (Pet. App. 3). After obtaining an extension of time to file its return for that year, however, petitioner sought to deduct not only the 12 contributions made in respect of services performed during 1989 but, purporting to rely on Section 404(a)(6), also deducted eight additional monthly contributions made in respect of services performed after the close of that year—the period from January through August 1990 (Pet. App. 4). On its 1990 tax return, petitioner deducted the contributions for

the last four months of 1990 plus the first eight months of 1991, for a total of 12 months' contributions (*Ibid.*).

c. The Internal Revenue Service disallowed deductions for contributions resulting from hours worked after the close of petitioner's taxable years. The Service allowed deductions only for the 12 contributions paid in respect of covered services performed in each taxable year (Pet. App. 4). Petitioner paid the resulting tax and commenced this refund suit in district court.

2. The district court granted petitioner's motion for summary judgment (Pet. App. 22-27). The court concluded that, since all contributions to the plans were deposited in "one single pooled fund," and neither the amount nor the timing of the contributions affected the benefits payable to employees, the plans treated contributions made after the close of the taxable year in the same manner that it treated contributions made before the end of the taxable year (*id.* at 24-25).

3. The court of appeals reversed on the authority of its decision in *Lucky Stores, Inc.* v. *Commissioner*, 153 F.3d 964 (9th Cir. 1998), petition for cert. pending, No. 98-1279 (Pet. App. 2). In *Lucky Stores*, the court of appeals concluded that the additional contributions that the taxpayer sought to deduct for periods after the close of the tax year "were required to be paid because of work done during the [subsequent] taxable year * * * , not the previous year" (Pet. App. 16). Because the payments were not "on account of" the prior year, the court concluded that the "bare language" of Section 404(a)(6) "precludes the deduction of those payments" in the prior year (*ibid*).

The court of appeals in *Lucky Stores* also rejected the assertion of the petitioner that, because the contributions were pooled and did not affect the defined benefit of any individual employee, the payments satisfied the

"same treatment" requirement of Rev. Rul. 76-28 (Pet. App. 17-19). The court explained in *Lucky Stores* that this contention simply ignores (i) that the taxpayers are contractually obligated to make each contribution near the end of each month; (ii) that the amount of each contribution is based on hours or weeks of service rendered during the immediately preceding month; (iii) that plan administrators monitored the dates of receipt of monthly contributions, and were empowered to assess interest charges and late fees on delinquent accounts; (iv) that plan administrators were not prepared to process contributions in excess of the required monthly amounts, and petitioner made no advance contributions; and (v) that plan administrators treated each remittance as fulfillment of petitioner's required contribution for a discrete month (*Id.* at 18). The court stated in *Lucky Stores* that such facts establish that the plans did *not* treat the additional contributions in the same manner they treated contributions made on the last day of petitioner's taxable year (*Id.* at 18-19).

The court in *Lucky Stores* also rejected any reliance on the private rulings that the taxpayers claim reveal an administrative practice of allowing the deductions. The court stated that "[t]axpayers other than those to whom such rulings or memoranda were issued are not entitled to rely on them. * * * Nor could the IRS establish a binding practice in conflict with § 404(a)(6)" (Pet. App. 19 n.5).

In *Lucky Stores*, the court stated that the history of Section 404(a)(6) shows that its purpose is to allow employers sufficient time after the close of their taxable year to calculate the maximum contribution deductible under Section 404(a). The court emphasized that its decision comports with that legislative purpose (Pet. App. 19).

4. In a separate case involving virtually identical facts and issues, the Tenth Circuit reached the same result reached by the Ninth Circuit in *Lucky Stores* and in the present case. *American Stores Co.* v. *Commissioner*, 108 T.C. 178 (1997), aff'd, No. 97-9025, 1999 WL 122996 (10th Cir. Mar. 9, 1999). That decision was entered after the petition for a writ of certiorari was filed in this case.

ARGUMENT

This case presents the same question concerning the proper interpretation of Section 404 of the Internal Revenue Code that is presented in *Lucky Stores, Inc.* v. *Commissioner*, No. 98-1279. For the reasons stated in our brief in opposition in that case, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other appellate court.[4] Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] We are providing herewith to petitioner a copy of our brief in opposition to the petition for a writ of certiorari in *Lucky Stores, Inc.* v. *Commissioner*, No. 98-1279.